Office Supreme Court, U.S.
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JOHN T. FEY, Clerk

No. 444

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 16367

MANUFACTURERS CASUALTY INSURANCE CO.
Appellant

versus

MARTIN-LEBRETON INSURANCE AGENCY
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

(ORIGINAL RECORD RECEIVED)

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

* * * * * * * * * * * * * * * * * * *

MANUFACTURERS CASUALTY INSURANCE CO. *

versus *

MARTIN-LEBRETON INSURANCE AGENCY *

No. 5174

Civil Action

* * * * * * * * * * * * * * * * * * *

A P P E A R A N C E S:

PORTEOUS & JOHNSON
Parnell J. Hyland, Esq.,
Wm. A. Porteous, Jr., Esq.,
Attorneys for Plaintiff - Appellant

NORMANN & NORMANN
Frank S. Normann, Esq.,
Attorneys for Defendant - Appellee

...oOo...

APPEAL from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 25th day of September, 1956, at the City of New Orleans, Louisiana.

...oOo...

COMPLAINT

(Number and title omitted) (Filed: June 24, 1955)

The complaint of Manufacturers Casualty Insurance Company shows:

(1)

Complainant, Manufacturers Casualty Insurance Company, is a foreign insurance corporation, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, authorized to do and doing business in the State of Louisiana, at all times set forth in this complaint.

(2)

Defendant, Martin-LeBreton Insurance Agency, is a partnership composed of George E. Martin and Edward F. LeBreton, Jr., both persons above the full age of majority; residents of and domiciled in the City of New Orleans, State of Louisiana; that the partnership known as "Martin-LeBreton Insurance Agency" is engaged in the general insurance agency business in the City of New Orleans and adjacent territory; that complainant demands judgment against the partnership and the individual members thereof.

(3)

The amount in controversy between the parties hereto, exclusive of interest and costs, exceeds the sum of THREE THOUSAND and 00/100 ($3,000.00) DOLLARS and the facts and things complained of herein occurred in the Parish of Orleans, State of Louisiana, within the New Orleans Division of this Honorable Court.

(4)

That on the 18th day of June 1948, the defendant, Martin-LeBreton Insurance Agency, became the Agent for Complainant, Manufacturers Casualty Insurance Company, as per copy of Agency Agreement, which is annexed hereto and made part hereof, pleaded in full and marked Exhibit "1" for purposes of identification.

(5)

Complainant avers that the aforesaid Agency Agreement specifically provides, in Paragraph 2 thereof, the following:

> "2. Agent shall in no case obligate the Company except within the limitations in the instructions issued by the Company, nor alter, waive or change any of the terms rates or conditions of the Company's policies or contracts, without specific and written authority to do so. Agent agrees to keep and observe with all fidelity to the Company all instructions by it to Agent".

(6)

Complainant avers that on the 28th day of June 1948, it issued to the defendant its printed "Instructions and Limitations Governing the Use of Power of Attorney", the original of which is annexed hereto and made part hereof, pleaded in full and marked Exhibit "II" for purposes of identification.

(7)

Complainant avers that on the 25th day of January, 1951, without any authorization and without authority from complainant, the defendant, George E. Martin, signed a contract bond between the Bennette Contracting Company and the Orleans Parish School Board for the repair of broken stones, cut out and

repair of broken brickwork, and waterproofing of all exterior walls of Warren Easton High School, New Orleans, Louisiana, for the sum of Thirteen Thousand Eight Hundred and 00/100 ($13,000.00) Dollars, and signed the name of Manufacturers Casualty Insurance Company by George E. Martin, Attorney in Fact, as Surety. A copy of the aforesaid contract bond is annexed hereto and made part hereof, pleaded in full and marked Exhibit "III" for purposes of identification.

(8)

Complainant avers that in accordance with Exhibit "II", "Instructions and Limitations Governing The Use of Power of Attorney", as set forth in Pages 9, 10 and 11 thereof, defendants were required to submit the aforesaid application for the aforesaid bond to the complainant's home office for approval prior to executing the bond, all of which defendant failed to do.

(9)

Complainant avers that not only did the defendants lack authority to write the aforementioned bond, but that they were specifically advised by the home office of complainant not to execute the said bond.

(10)

Complainant avers that the contractor on the aforesaid contract bond, marked "Exhibit "III", defaulted and complainant had to take over the work and complete the contract; that complainant obtained bids from several contractors for the completion of the work, and finally awarded the job to the

Western Waterproofing Company.

(11)

Complainant sustained a loss of Seven Thousand Two Hundred Eighteen and 45/100 ($7,218.45) Dollars, plus expenses in the amount of Five Hundred Six and 96/100 (Dollars, or a total loss of Seven Thousand Seven Hundred Twenty Five and 41/100 ($7,725.41) Dollars, for which sum defendant is indebted unto complainant.

WHEREFORE, complainant, Manufacturers Casualty Insurance Company, demands judgment against defendant Martin-LeBreton Insurance Agency and the individual members thereof, George E. Martin and Edward F. LeBreton, Jr., in the sum of Seven Thousand Seven Hundred Twenty Five and 41/100 ($7,725.41) Dollars, plus legal interest from the date of the filing of this suit and all costs.

And for all general and equitable relief.

(sgd) Leslie F. Wells

(sgd) Porteous & Johnson

(sgd) W. A. Porteous, Jr.
2008 American Bank Building
New Orleans, Louisiana
Attorneys for Complainant

...oOo...

EXHIBIT ONE ANNEXED TO FOREGOING COMPLAINT

AGENCY AGREEMENT

------with------

MANUFACTURERS CASUALTY
INSURANCE COMPANY
PHILADELPHIA - PENNSYLVANIA

MANUFACTURERS CASUALTY INSURANCE COMPANY

AGENCY AGREEMENT

This Agreement, made this 18th day of June, A.D. 1948 by and between MANUFACTURERS CASUALTY INSURANCE COMPANY, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and having its principal office in the City of Philadelphia and Commonwealth of Pennsylvania, (herein called "Company") and Martin LeBreton Insurance Agency 208 Strand Bldg. of New Orleans in the County of .....and State of Louisiana (herein called "Agent")

WITNESSETH THAT:

Pursuant to a request that the underwriting facilities of the Company be made available to the undersigned, as Agent, the Company hereby appoints and constitutes the said Agent as its Agent and grants authority to Agent to receive and accept proposals for such bonds and contracts of insurance in the following territory, viz: New Orleans, La. and adjacent territory as the Company has authority lawfully to make; subject, however, to restrictions placed upon such Agent by the laws of the state or states in which such Agent is authorized to do an insurance business and to the terms and conditions hereinafter set forth.

IT IS HEREBY AGREED between the Company and Agent as follows:

1. Agent has authority to receive and accept proposals for bonds and insurance covering such classes of risks as designated herein and as hereinafter authorized in the Schedule

of Commissions attached hereto and made a part hereof; to collect, receive and receipt for premiums on the insurance tendered by the Agent to and accepted by the Company; to retain out of premiums so collected, as full compensation on business so placed with the Company, commissions on the net premiums (i.e., gross premiums less return premiums) under such terms and limitations as are set forth in Schedule of Commissions attached hereto and made a part hereof; and to perform such other acts as are incident thereto.

2. Agent shall in no case obligate the Company except within the limitations in the instructions issued by the Company, nor alter, waive or change any of the terms, rates or conditions of the Company's policies or contracts, without specific and written authority to do so. Agent agrees to keep and observe with all fidelity to the Company all instructions by it to Agent.

3. Agent shall not publish or use any advertisement respecting the Company, nor use any circular or paper referring to the Company, without having first obtained the written authority of the Company.

4. Company reserves the right to withdraw authority from Agent to write any risk or any classification of risks at any time without previous notice.

5. Agent shall refund ratably to the Company, on business heretofore or hereafter written, commissions on canceled policies and on reductions in premiums at the same rate at which such commissions were originally retained.

6. Agent assumes responsibility for and agrees to pay the

premiums, whether original, renewal, or through endorsements or payroll audit accounts, on all policies and bonds issued by or through Agent, and agrees to remit such premiums, less the commissions to which he is entitled, to the Company within sixty (60) days following the close of the month in which the policies or bonds were effective or the endorsements were made or the payroll audit accounts were established. If premium for any policy is outstanding beyond the settlement period herein stated, the Company shall have the right without waiving any terms herein stated, by direct notice to the insured, to collect said premium or to cancel such policy, and in every case where, pursuant to the exercise of such right, collection is made by the Company, the costs of collection as determined by the Company shall be charged against the commission which might otherwise accrue to Agent, but such charge shall in no event exceed the amount of said commission.

7. Agent shall be responsible capacity for all funds received or collected in respect to business placed by or through Agent with the Company, it being understood that all premiums paid to Agent are the property of the Company.

8. Agent shall, within sixty (60) days of the effective dates thereof, return to the Company all policies issued for the account of Agent but not delivered to the insured, and all policies delivered to the insured upon which the premiums due thereon have not been paid by the insured, or, in the event that said policies cannot be returned, shall notify the Company that premiums due thereon have not been paid by the insured, and

in case of lost policies shall forward to the Company a Lost Policy Release properly signed or request the Company to effect cancelation of the policy by notice to the insured. The Agent is liable for the earned premiums on all policies not so returned or as to which notice has not been given to the Company in accordance with the provisions of this paragraph.

9. Agent may relieve himself of the responsibility to pay premiums charged as the result of payroll audits by notifying the Company in writing of his inability to collect such premiums within thirty (30) days following the date on which the Company notified Agent that the excess premium was due. The failure of Agent to give the Company such written notice of his inability to collect such premiums shall be construed as acceptance by Agent of responsibility to pay such premiums in accordance with the terms of this agreement. If Agent relieves himself of the responsibility to pay such premiums in the manner provided herein, the Company may endeavor to collect such premiums in any manner it may see fit, and in every case where collection is made by the Company, the costs of collection as determined by the Company shall be charged against the commission which might otherwise accrue to Agent, but such charge shall in no event exceed the amount of said commission.

10. Agent shall, on demand therefor, account to and with the Company for all monies, premiums, policies, supplies, documents, seals, powers of attorney, and other property belonging to the Company. Agent shall himself be responsible for the direction of all acts, doings and agreements of any and all solicitors, agents, special agents, canvassers, clerks and other

employees of Agent appointed or employed by him, in or about the transaction of said business, and Agent shall be liable to the Company for any and all loss or damage sustained by the Company by reason of any act or thing done or performed by Agent or those under him as aforesaid not in accordance with the terms of this agreement. Agent agrees that he and his said solicitors, agents, special agents, canvassers, clerks or other employees shall be subject always to such rules and regulations as may be prescribed by the Company during the continuance of this agreement.

11. The Company, through its authorized representative, shall have the right at all reasonable times to audit the books, vouchers, and records of Agent insofar as they pertain to the business of the Company, and Agent shall render such assistance as may be required of him to that end.

12. All policies, bonds, manuals, renewal receipts, vouchers and other Company supplies furnished to Agent by the Company shall always remain the property of the Company and shall be returned to the Company or its representatives promptly upon demand.

13. Agent agrees to pay all expenses of conducting the business of Agent, including all salaries, commissions and other compensation of any kind earned by or which may become payable to employees of and producers for Agent, except that expressage, postage or freight charges on articles and supplies sent by the Company to Agent shall be paid by the Company.

14. In the event of breach by Agent of any terms or

conditions of this agreement, the Company shall have the right without further demand or notice, to immediately cancel this agreement and terminate the authority granted herein.

15. Except as otherwise provided, this agreement may be terminated by either party at any time upon written notice to the other stating when not less than thirty (30) days thereafter, such termination shall be effective.

16. In the event of termination of this agreement, Agent's records, use and control of expirations shall remain the property of Agent and be left in his undisputed possession provided Agent has promptly accounted for andpaid to the Company all premiums as provided in this agreement; otherwise the records, use and control of expirations shall be vested in and become the property of the Company.

17. Terms and conditions of this Agreement which are in conflict with the statutes or Insurance Department rulings of any State in which this agreement is operative are hereby amended to conform to such statutes or rulings.

18. It is expressly understood and agreed that any failure by the Company to take advantage of any breach by Agent of the terms or conditions of this agreement shall not be deemed to constitute, or be construed as, waiver of any right of the Company thereafter to enforce any such terms or conditions.

19. This agreement contains the entire understanding between the parties hereto, and supersedes any previous understandings or agreements, whether written or oral, between the Company and Agent.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed on the day and year first above written.

MANUFACTURERS CASUALTY INSURANCE COMPANY
BY: (s) G. H. Sawer
Vice President

MARTIN-LeBRETON INSURANCE AGENCY
Name of Agent, Corporation or Partnership

By (s) G.W. Martin (s) Edward F .LeBreton Jr.

WITNESS:

(s) M. F. Ward

WITNESS:

(s) D. Kostmayer

(s) Mrs. E. Garon

SCHEDULE OF COMMISSIONS

Agent is authorized to accept proposals for those kinds and classes of insurance and bonds only as have set opposite thereto below a percentage of commissions or as may hereafter be authorized in writing. In consideration of, and as full payments for, all acts performed by Agent pursuant to this Agency Agreement, Company agrees to pay and Agent agrees to accept as full compensation, commissions on the net premiums (i.e., gross premium less return premium) collected and remitted to the Company by Agent on the following basis:

Accident and Health:

Accident	-- %
Accident and Health	-- %
Hospital	-- %
Group	-- %

Bodily Injury Liability:

Automobile	-- %
All Other Forms of Bodily Injury Liability	-- %
Exceptions:	
(1) Automobile-Long Haul Truckmen Risks and Public Passenger Carrying Risks (excepting school buses)	-- %

Property Damage Liability:

Automobile	-- %
All Other Forms of Property Damage Liability	-- %
Exceptions:	
(1) Automobile-Long Haul Truckmen Risks and Public Passenger Carrying Risks (excepting school buses)	-- %
Collision	-- %
Burglary	-- %
Plate Glass	-- %
Fidelity, Surety and Forgery Bonds	30 %
Exceptions:	
Commercial Blanket Fidelity and Blanket Position Bonds	20 %
Bankers, Brokers, and Building and Loan Blanket Bonds	15 %
Government Contracts-subject to special agreement	
CDDD Policies-subject to commissions shown above for Commercial Blanket Bonds, Burglary, and Forgery Bonds	
Workmen's Compensation	-- %

...oOo...

CONTRACT AND BOND

BETWEEN
BENNETTE CONTRACTING CO.
and
ORLEANS PARISH SCHOOL BOARD

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF ORLEANS
CITY OF NEW ORLEANS

RECEIVED
Feb 13,1951
BOND DEPT.

BE IT KNOWN, That on this 25th day of the month of January, in the year of Our Lord one thousand nine hundred fifty-one (1951), before me, JACOB H. MORRISON, a Notary Public, duly commissioned and qualified, in and for the Parish of Orleans, State of Louisiana, residing therein, and Official Notary of the City of New Orleans, and in the presence of the witnesses hereinafter named and undersigned,

PERSONALLY CAME AND APPEARED:

Jacqueline T. Leonhard, President of the Orleans Parish School Board, and for and on its behalf, hereinafter called "Owner", and BENNETTE CONTRACTING CO., HEREIN represented by J. H. Geiger, Owner, hereinafter called "Contractor", which said appearers declared that the said Bennette Contracting Co., Contractor, has agreed to do, and does by these presents agree, for the consideration mentioned and contained herein, to furnish all necessary labor, material and equipment ---- in full accordance with specifications and proposal attached hereto and made part hereof for the repair of broken stones, cut out and repair of broken brickwork and waterproofing of all exterior walls of Warren Easton High School, New Orleans, La., for the sum of Thirteen Thousand Eight Hundred & no/100--Dollars $13,800.00) and Contractor agrees to do and perform each and every one of the obligations in conformity with the said specifications.

In consideration of the faithful and complete performance by Contractor of all and singular the obligations by ~~him~~ it herein assumed, the Orleans Parish School Board Hereby

agrees to pay unto the said Contractor its successors, legal representatives and assigns, at the times and in the manner set forth in the specifications above referred to, the price for the work to be done under this contract, in accordance with the proposal of said Contractor duly accepted by Owner.

And now to these presents came and appeared: MANUFACTURERS CASUALTY INSURANCE COMPANY who, acknowledging to having taken cognizance of the foregoing, hereby firmly and truly binds said company, its legal successors, representatives and assigns as surety, together with Bennette Contracting Co, as principal, unto Orleans Parish School Board, its legal successors, representatives and assigns in the full sum of Thirteen Thousand Eight Hundred & no/100 Dollars ($13,000.00), for which payments, well and truly to be made, to the said Orleans Parish School Board, its legal successors, representatives and assigns, the said Bennette Contracting Co, ~~its~~ his successors, representatives and assigns are hereby fully bound.

The condition of this obligation being that if the said Bennette Contracting Co. shall well and faithfully perform the obligations assumed by ~~it~~ him in the foregoing contract and shall pay all labor and all furnishers of materials and all persons for all services rendered to ~~it~~ him or to any subcontractor under ~~it~~ him, including materials used in machines by ~~it~~ him or any sub-contractor under ~~it~~ him in connection with remedial waterproofing of Warren Easton High School, New Orleans, Louisiana---

and shall fully secure and protect the said Orleans Parish

School Board, its legal successors and representatives from all suits or actions of any name or description brought against them for or on account of any injuries or damages received or sustained by any party or parties by or from said Contractor, ~~his~~ its agents or servants in the performance of said work, or by or in consequence of any negligence in guarding the same, or in improper material used in its construction, or by or on account of any act of omission of the said Contractor, ~~his~~ its sub-contractors, servants or agents and shall faithfully perform this contract and shall deliver all such work to the said Orleans Parish School Board free from all claims, liens and expenses, then this bond shall become null and void; otherwise, it shall remain in full force and effect.

Moreover, Bennette Contracting Co. and Manufacturers Casualty Ins. Co. his surety, do, by act of signing this contract and bond, consent and yield to the jurisdiction of the Civil District Court of the Parish of Orleans, Louisiana, and do formally waive any plea of lack of jurisdiction, on account of their residence elsewhere, in the event of suit under this contract or bond.

THUS DONE, PASSED, SIGNED AND DELIVERED in my office, at New Orleans, Louisiana, on the aforesaid day, month and year, in the presence of Lucille K. Carriar and Beverly L. Bensel, competent witnesses, both domiciled in this City, who hereunto sign these presents together with the parties and me, Notary, after due reading of the whole.

(original signed) ORLEANS PARISH SCHOOL BOARD
BY: Jacqueline T. Leonhard

BENNETTE CONTRACTING CO.

By: (s) J.H.Gieger Owner
Title

Surety:

MANUFACTURERS CASUALTY INSURANCE CO.
BY: G. E. Martin
Atty-in-fact

WITNESSES:

Lucille K. Carriar

Beverly L. Bensel

RECORDED IN MORTGAGE OFFICE
BOOK 1818 FOLIO 375
NEW ORLEANS, LA. L/29/51

APPROVED AS TO FORM:

Jorda S. Derbes
ASSISTANT CITY ATTORNEY

Jacob H. Morrison
Notary Public

A True Copy:

(s) Jacob H. Morrison
Notary Public

...oOo...

ANSWER OF DEFENDANTS

FIRST DEFENSE

1.

Defendants admit the allegations of Paragraph 1 of the Complaint.

2.

Defendants admit the allegations of Paragraph 2 of the Complaint, except the allegation demanding judgment against defendants.

3.

Defendants admit the allegations of Paragraph 3 of the complaint.

4.

Defendants admit the allegations of Paragraph 4 of the Complaint.

5.

Defendants admit the allegations of Paragraph 5 of the Complaint, but aver the condition of the agency agreement relied upon was qualified by the action of the plaintiff herein.

6.

Defendants admit the allegations of Paragraph 6 of the Complaint.

7.

Defendants admit the allegations of Paragraph 7 of the Complaint.

8.

Defendants deny the allegations of Paragraph 8 of the Complaint, save and except as hereinafter admitted, and show that they acted in good faith in the belief that the application when submitted for approval, would be accepted and approved, as indeed it was in law and fact.

9.

Defendants deny the allegations of Paragraph 9 of the Complaint, and in amplification of said denial, aver and show that the attempted disavowal of the contract bond was received by the defendants only after they had in good faith and as set forth in the present answer executed and signed the said contract.

10.

Defendants admit the allegations of Paragraph 10 of the Complaint.

11.

Defendants, answering Paragraph 11 of the Complaint, admit that the Complainant suffered a loss in said transaction. Defendants deny their responsibility or liability to Complainant for said loss or any part thereof; and for lack of sufficient information to form a belief as to the correctness of the other allegations of said Paragraph 11, deny the same.

SECOND DEFENSE

12.

Defendants aver and show that the Complainant never disavowed the authority of defendants as agent in said transaction. On the contrary, Complainant received, accepted and retained the premium on said policy; took hold exclusively and in its sole discretion of all steps made necessary by the default of the contractor; on completion by it as surety of the contractor's contract and work, received the amount due to it as surety under the terms of the policy; and generally in every way ratified the transaction and the act of the defendants as its agent in securing the business and executing and signing said policy. The subsequent recognition of and compliance with the act of an agent is equivalent to a previous authority, and the principal is estopped thereafter from disavowing or repudiating said act, - the whole as pleaded and set forth in the Motion to Dismiss filed this day by defendants

in the present proceedings, and demand for summary judgment.

13.

Defendants request that the issues in the present case be tried by jury, and have this day served on Complainant's counsel, pursuant to Rule 38(b), their written notice and demand to that effect.

WHEREFORE, defendants pray for trial by jury and in due course for verdict and judgment in their favor and against the Complainant, denying the demand of said Complainant and dismissing its suit herein, with costs.

NORMAN & NORMANN
1605 Hibernia Bank Building
New Orlenans, 12, Louisiana
By: (s) F. Normann
Attorneys for Defendants.

NOTICE OF DEMAND FOR TRIAL BY JURY AND CERTIFICATE OF SERVICE

The defendants in the above-entitled cause, demand a trial by jury, and through their undersigned counsel of record, hereby certify that a copy of the foregoing answer and demand for trial by jury, has been served upon Messrs. Porteous & Johnson, William A. Porteous, Jr., Esq., Trial Attorney, 2008 American Bank Building, New Orleans, La., by depositing a copy thereof in the United States Mail, postage prepaid, in envelope addressed to said counsel of record, at the address shown herein.

(s) Frank S. Normann
Attorney for Defendants.

...oOo...

DEFENDANTS' MOTION TO DISMISS AND NOTICE OF MOTION FOR SUMMARY JUDGMENT

(Number and title omitted) (Filed: April 3, 1956)

Martin LeBreton Insurance Agency, George E. Martin and Edward F. LeBreton, Jr., move this Honorable Court to dismiss this action and the claim of Complainant, Manufacturers Casualty Insurance Company, for the reason that, as movers now specially plead and show, the Complainant never disavowed or repudiated the agency of movers in writing the policy bonding the contractor's undertaking to and in favor of the owner, Orleans Parish School Board, but on the contrary received, accepted and retained the premium paid on the policy herein.

Further, that when said contractor defaulted, the Complainant took hold, exclusively and in its sole discretion and for its own account as insurer, of the entire matter, performing individually and in its own interest all steps, negotiations and other acts of every nature or character whatsoever, made necessary by the default of said contractor, and generally, in every way, without protest or repudiation of any kind at any time, completely recognized the action of movers as its agents in securing the said insurance coverage and in signing and executing said insurance policy as agent of Complainant.

Finally, that when the task of completing the work and contract of the defaulting contractor had been completed by Complainant received and collected from the owner, Orleans Parish School Board, the full amount payable to said contractor

and due to Complainant as surety under the aforesaid policy for having recognized said policy, and fully and completely discharged all its obligations as insurer and surety in accordance with the terms and obligations of its said insurance contract.

That subsequent recognition of and assent to and compliance with the act of an agent is equivalent to a previous authority; and when it is claimed that an agent has committed a breach of orders, but the principal, with full knowledge of the circumstances, adopts and fulfills the contract made by such agent, the principal is bound by his recognition and carrying out of the contract, is estopped thereafter from questioning or in any manner disavowing or repudiating the same and the capacity and authority of the agent; and the agent is discharged from all liability in the premises.

WHEREFORE, the defendants, Martin-LeBreton Insurance Agency, George E. Martin and Edward F. LeBreton, Jr., move this Honorable Court that the petition of the Complainant herein be dismissed and its claim and demand denied, at its cost, and that summary judgment be rendered herein.

NORMANN & NORMANN
(s) F. Normann
Frank S. Normann

...oOo...

AFFIDAVIT OF GEORGE E. MARTIN & EXIHIBITS

(Number and title omitted) (Filed: April 3, 1956)

George E. Martin, of New Orleans, of full age, being duly sworn, deposes and says:

Affiant is a member of the commercial firm styled "Martin-LeBreton Insurance Agency" engaged in the business of general insurance brokerage in New Orleans, hereinafter referred to as "Martin-LeBreton".

Said firm was the representative and agent in New Orleans of Manufacturers Casualty Insurance Company, doing business as a casualty insurance company in New Orleans, and hereinafter referred to as the "Insurance Company".

Martin-LeBreton received an application from J. H. Geiger, doing business as Bennett's Contracting Company, requesting the Insurance Company to act as surety for said Geiger (Bennett's Contracting Company) on a proposed contract with the Orleans Parish School Board for repairing broken stones, waterproofing, etc., at the Warren Easton High School in New Orleans, representing an undertaking in the sum of $13,800,000. In connection with said application, Martin-Le Breton secured all available personal data and credit information usual in such cases, including verification of bank balance, inquiries from local tradespeople, former customers, etc., and the Insurance Company was duly notified of all such information regarding said applicant Geiger.

The Insurance Company expressed some doubt as to whether it would be willing to authorize the proposed Bond, but on January 12, 1951, asked Martin-LeBreton for all papers relating to the matter and stated "we will do the best we can for you for this concern". (Exhibit D-1)

The Insurance Company had contemporaneously authorized

Martin-LeBreton to write another bond as surety for said Geiger also in favor of the Orleans Parish School Board. (Exhibit D-2)

In a letter written January 23, 1951, to Martin-LeBreton, the Insurance Company stated "they would see what they could do towards authorizing" the Geiger bond in question. (Exhibit D-3)

The Bond was executed by Martin-LeBreton on January 25th, and immediate notification thereof given to its principal, the Insurance Company. (Exhibit D-4)

On January 30, the Insurance Company wired that the bond should not be written. (Exhibit D-5)

The Insurance Company never notified the Orleans Parish School Board or anyone else, either before or after the default of Geiger, that the bond was unauthorized, nor was any notice of cancellation ever given to anyone.

The Insurance Company received and accepted the premium due for the writing of said bond. (Exhibit D-9)

On the default of the Contractor becoming known, the Insurance Company took entire charge of the matter, conducted all negotiations and took all necessary steps to complete the work. On April 13, 1951, the Insurance Company requested the Orleans Parish School Board not to advertise for bids to complete Geiger's defaulted job, but to allow it, the Insurance Company, to be given the opportunity of itself making all arrangements in its discretion for the completion of the work.

In completing the work and bringing the entire matter to

a conclusion, the Insurance Company made all arrangements individually and for its own account and gave its own directions, particularly in a letter of April 19, 1951, to Martin-LeBreton, as to all steps to be taken. (Exhibit D-6)

Martin-LeBreton was willing in any way in its power and in every respect to minimize the loss, to cooperate fully in carrying out all the instructions of the Insurance Company, but consistently denied any personal liability, particularly in a letter of July 30, 1951, (Exhibit D-7) and in an answer of August 1, 1951, (Exhibit D-8) the Insurance Company thanked Martin-LeBreton for its assistance "in helping us to conclude the matter", although stating they did not agree with Martin-LeBreton's view.

The Insurance Company never returned or offered to return the premium on said policy, which premium, as aforesaid, they had duly received and accepted.

Your affiant shows had this contract been executed without default or claim, affiant believes that the Insurance Company would have raised no objection to your affiant's action in writing the bond. That the insurance company could have easily notified the interested parties by wire or otherwise of their decision to dishonor their obligation upon the bond as having been written contrary to their instructions, if they were sincere they did not wish to assume the obligations provided by the bond, that had they notified the interested parties of their decision to withdraw from the bond, the contractor could have made arrangemtns to place the bond elsewhere. The Insurance Company having written one bond for this

contractor, affiant sincerely believed they would accept this bond, and their subsequent action certainly justified your affiant in that belief.

Your affiant further shows that the writing of bonds is a highly competitive business, much sought after by insurance companies who write and assume such risks. That the Manufacturers Casualty Company was constantly behind your affiant's agency to increase their writing of these risks, and while they have certain rules and regulations governing the solicitation of such risks, in the final analysis all such risks are eventually accepted upon the recommendation of the writing agency.

Your affiant further shows at no time were they specifically notified to cancel the bond, after notification to the Insurance Company of having written the same. That it would have been a simple matter for the Manufacturers Casualty Company to either by (1) long distance telephone, (2) telegram or by (3) special air mail delivery letter, to notify your affiant to immediately arrange for the cancellation and substitution of the bond, if the Insurance Company is sincere in their position that they had no intention of assuming their obligation thereunder and to hold your affiant's agency responsible for any loss suffered thereby. That their failure to affirmatively act in the premises at the premises at the time when they had the obligation and duty to so act, estops them from holding your affiant's agency responsible to them for the loss they allegedly suffered in this bond transaction.

Having accepted the benefit of the premium and retained same, they must likewise assume the obligation thereunder, upon their part to be performed.

(s) George E. Martin

Sworn to and subscribed before
me this 29th day of March, 1956.

(s) Frank Normann,
Notary Public

...oOo...

LETTER ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-1

MANUFACTURERS CASUALTY INSURANCE COMPANY
Pennsylvania Boulevard at 16th St.
Philadelphia 3, Pa.

January 12, 1951

Martin-LeBreton Insurance Agency,
208 Strand Building,
231 Baronne Street,
New Orleans 12, La.

Re: James H. Geiger, d/b/a Bennette's Contracting Co.
Painting Job approximately $2780.

Attention: Mr. Martin

Gentlemen:

Immediately upon receipt of your night letter we wired you stating that we preferred not to authorize this job without full investigation. We know nothing whatsoever of Mr. Geiger and upon looking over the Dun & Bradstreet book for January of this year, we cannot find that he is even listed personally; neither is the Bennette Contracting Company. While we have no doubt the statement which you have made in this night letter is correct, we still do not feel that we should authorize this bond until such time as a completed financial statement is forwarded to us by Mr. Geiger. We also would like the names of the supply houses from whom he makes his purchases and verification of the cash in bank. As soon as these papers are submitted we will be very glad to commence our investigation and, if satisfactory, will see what we can do towards giving you authority to execute bonds for this concern.

In your night letter you state he has Accounts Receivable of $1400. As no information is given as to these Accounts Receivable, we are wondering if perchance they might be some receivables from some small painting jobs which he has already done.

Please forward the necessary papers immediately and we will do the best we can for you for this concern.

Very truly yours,

(s) J.H.Dodge
J. H. Dodge, Supt.
Contract Department

JHD:F

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED
EXHIBIT D-2

WESTERN UNION

NSA065 PB097
P.LLC155 PD-WuX PHILADELPHIA PENN 23 1117A-
MARTIN-LE BRETON INSURANCE AGENCY
208 STRAND BLDG 231 BARRONE ST. NRLNS-

AUTHORIZE CONTRACT BOND TWO THOUSAND SEVEN HUNDRED EIGHTY DOLLARS JAMES H. GEIGER -

J. H. DODGE MANUFACTURERS CASUALTY INSURANCE CO --

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED
EXHIBIT D-2

C O P Y

January 24, 1951

Manufacturers Casualty Company
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Gentlemen: RE: J. H. Geiger

Thank you for your authorization in connection with the above case authorizing the execution of the bond for $2,780.00. We are sorry that we had to rush you so much in this case, particularly since nothing has happened as of this day. However,we expect both the $2,780.00 and the $13,800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so.

Our principal as previously explained will not undertake any other job until these are completed.

Yours very truly,

MARTIN-LeBRETON INS. AGENCY

GEM:dk

G. E. Martin

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-3

MANUFACTURERS CASUALTY INSURANCE COMPANY
Pennsylvania Boulevard at 16th St Philadelphia 3, Pa.

January 2[illegible], 1951

Martin-LeBreton Insurance Agency,
208 Strand Building,
231 Baronne Street,
New Orleans 12, La.

Re: James H. Geiger

Gentlemen:

This will confirm our wire authorizing you to execute a bond for James H. Geiger covering a contract of approximately $2780. In regard to the bond of approximately $13,800. for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond.

Very truly yours,
(s) J. H. Dodge
J. H. Dodge, Supt.
Contract Department

JHD:F

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-4

C O P Y

February 3 1951

Mr. J. H. Dodge, Supt. Contract Dept.
Manufacturers Casualty Insurance Dept.
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Dear Mr. Dodge: RE: James H. Geiger - your letter of January 23, 1951.
Anthony Hamlin, Inc. - your letter of January 22, 1951. - Bond #42697

Your letters of January 22, and January 23, in connection with the above were received by us on the afternoon of January 25, 1951. We have since informed you that Anthony Hamlin, Inc., was unsuccessful bidder. The reason we executed this bond in spite of the fact that our principal's bid was figured at an excessive profit and he was not trying to get this job. However, the bid was not complimentary. It was just one of those cases, had he been successful bidder there would have been a fabulous profit.

As to the indemnity of Mr. & Mrs. Anthony Hamlin, I did not think it was necessary to secure it unless our principal was low bidder. I have known Mr. & Mrs. Hamlin over fifteen years, and I know when they agree to perform a certain task they will do it, and they agreed at the time I executed this bid bond that they would sign the proper indemnity agreement.

The original bid was signed by Hamlin personally. Mr. Hamlin called me from out of town and asked me to please execute this bid bond the following morning in order that his office could file this bid, which he had figured. At that time he told me, that Mr. Groetch had authorization to sign for his firm. Since the contract and the bond on the federal form was already signed by Hamlin, I had no hesitancy in accepting Mr. Groetch's signature. Total work on hand at the time of the execution of this bond was the uncompleted portion of two contracts recently awarded in the sum of $9400.00 and $6900.00

As to James H. Geiger, we executed the bond authorized in the sum of $2780.00 and he was also awarded the contract which we discussed over the telephone for $13,800.00. He was low bidder by $1560.00. The $13,800.00 case and the $2780.00 broke simultaneously. Mr. Geiger called very early on the morning of January 25, 1951 and asked me to meet him in the notary's office at 9:30 a.m., which I did, and we executed both bonds since his bid was in line.

As previously explained, Mr. Geiger was well recommended by the people we contacted as to honesty, integrity, and ability, with the further fact that he has handled like jobs of this size and larger before.

The delay in corresponding with you was due to the fact that I was waiting for a copy of the contract from the Orleans Parish School Board's notary in order that we may furnish you with all pertinent papers at one time.

I feel sure that if you and your underwriting committee look at this case from an objective point of view, you will concur with the actions already taken.

Yours very truly,

MARTIN-LeBRETON INS. AGENCY

G. E. Martin

GEM:dk
Encl. (1)

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-5

WESTERN UNION

NSA156 PA354

P.LLA430 PD-WUX PHILADELPHIA PENN 30 227P-

MARTIN-LE BRETON INSURANCE AGENCY -
208 Strend Bldg. 231 Barronne St., NRLNS_

DO NOT EXECUTE BOND J. H. GEIGER THIRTEEN THOUSAND EIGHT HUNDRED UNLESS AUTHORIZED SEE LETTER JANUARY TWENTY THIRD --

J. H. DODGE MANUFACTURERS CASUALTY INSURANCE CO --

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-6

MANUFACTURERS CASUALTY INSURANCE COMPANY
Pennsylvania Boulevard at 16th St., Philadelphia 3, Pa.
Legal Department
Wm. H. Loesch, Jr.,
Counsel

SPECIAL DELIVERY
AIR MAIL

April 19, 1951

Mr. G. E. Martin
Martin-LeBreton Insurance Agency
208 Strand Building
231 Baronne Street
New Orleans, 12, Louisiana

Re: Benette's Contracting Co.

Dear Mr. Martin:

We have been advised by the Acting Business Manager of the Orleans Parish School Board that the second lowest bidder at the time the waterproofing contract was let, was Standard Waterproofing Company of Houston, Texas; their bid, $19,453. The acceptance of this bid would cause us to have an automatic loss of about $6,000.00

It was indicated that two New Orleans firms wish to participate if this work is re-advertised. They are the Builders Silicone Products, Inc., 520 N. Rampart Street and Southeast Distributors, Inc., 636 Carondelet Street. I suggest that you contact these firms immediately and get an indication of what their price would be. Will you also ascertain what equipment or materials is on the job and whether or not the price would be reduced if these were turned over to the new contractor.

The School Board will allow us to relet the contract, provided it is done promptly. Will you therefore secure complete information and advise us immediately.

Very truly yours,

Wm. H. Loesche, Jr.,
Counsel

WHL.m

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT D-7

C O P Y

AIRMAIL

July 30, 1951

Mr. Troward G. Wells, Counsel or
Manufacturers Casualty Ins. Co.
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Dear Mr. Wells: RE:02R-252 Bennette Contracting Company

Please be advised that we have always taken the position that this agency has no personal liability in connection with the above captioned and therefore, the decision must rest with you.

We are, therefore, returning your letter of July 27, addressed to Hotard in the event that you choose to mail same direct. However, we will be glad to continue to service you and do everything we can to reduce your loss and if it is your desire we will be glad to deliver same to Hotard in accordance with your instructions.

In anticipation of your accepting Modern over Western we have asked this firm to specifically state the amount of money that will be allowed for the unused material. I have furnished them with a copy of the inventory which I took on April 23, 1951. Naturally the lime and cement would no longer be useable because of the humidity.

Very truly yours,

MARTIN-LEBRETON INS. AGENCY

G. E. Martin

GEM:dk
Encl. (1)

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT D-8

MANUFACTURERS CASUALTY INSURANCE COMPANY
Pennsylvania Boulevard at 16th St., Philadelphia 3, Pa.

August 1, 1951

Mr. G. E. Martin
Martin-LeBreton Insurance Agency
208 Strand Building
231 Baronne Street
New Orleans, Louisiana

Re: 02R-252 Bennette Contracting Company

Dear Mr. Martin:

Attached is copy of our letter of this date to Mr. Hotard which we wrote after receipt of your letter of July 30.

We appreciate your cooperation in assisting us in itemizing this loss and wish you to continue in helping us to conclude this matter. We suggest that you contact the School Board and ascertain if they are going to arrange for contract with Modern Building Cleaning Company. Your wire referred to Modern Waterproofing, but we assume you meant Modern Building Cleaning Company. The reason we believe it advisable for you to contact the Board is to avoid any delay in the event the Board, for some reason, does not desire to contract with Modern Building Cleaning Company. In such event, you can explain to the Board that we feel it has the right to arrange for the completion of the work, as pointed out to you in our letter of July 27.

While it is not relative to go into the question at the present time, we must for the record, mention that we do not agree with your position as set forth in the first paragraph of your letter of July 30,

Very truly yours,

(s) Troward G. Wells,
Counsel

TGW.m
Att.

...oOo...

EXHIBIT ANNEXED TO FOREGOING AFFIDAVIT MARKED EXHIBIT D-9

Jan a/c

MARTIN-LeBRETON INSURANCE AGENCY
Insurance of all kinds
208 Strand Bldg.,231 Baronne St.,
New Orleans, 12, La.

New Orleans, La. 3/8 1951 NO. 4159

Pay to the Order of Manufacturers Casualty Ins. Co. $ 208.49

Two Hundred Eight & 49/100 - - - - - - - - - - - - - Dollars

TO THE HIBERNIA NATIONAL BANK
IN NEW ORLEANS
NEW ORLEANS, LA.

Martin-LeBreton Insurance Agency

(s) Edward F. LeBreton
(s) G. E. Martin C.H.

ENDORSEMENT ON REVERSE OF CHECK

The Hibernia National Bank in New Orleans
Mar 15, 1951
INTERIOR TELLER

FOR DEPOSIT ONLY
MANUFACTURERS' CASUALTY INSURANCE CO.

PAY TO THE ORDER OF ANY BANK, BANKER OR TRUST CO.
FROM ENDORSEMENTS GUARNANTEED

MAR 13 51

THE FIRST NATIONAL BANK
Philadelphia, Pa.
William A. Hoover, Cashier

...oOo...

35

MARTIN-LeBRETON INSURANCE AGENCY
formerly
Roy Martin & Co., Inc.
New Orleans, La.

Sheet No. 1

Company Manufacturers Casualty Ins. Co. Premiums Written Month January 1951 Agent Direct Production Code No.

Cl Sym.	Policy No.	Assured	Auto P.L. P.D. & Med.	Auto Fire Theft & Comp.	Auto Coll.	Gen. P.L. P.D. & Coll.	30% Bonds	Compen-sation	Plate Glass	Burglary	Fire. Torn. & Ext. Cov.	Marine			Total Pre-mium	Ex-pira tion	Re-marks
	42693	Whitney Realty Co., Inc.					75.00						Licenses	Bond gem	75.00		
	42697	Anthony Hamlin, Inc.					5.00						Bid	gem	5.00		
	42696	Anthony Hamlin, Inc.					5.00						Bid	gem	5.00		
	42664	Delcuze & Weaver Co.					75.00						License	leb	75.00		
	42698	Bennettes Contr. Co.					20.85						Contr	gem	20.85		
	42699	Bennettes Contr. Co.					138.00						Contr	gem	138.00		
							318.85								318.85		
																	75.00 leb
																	243.85 gem

MARTIN-LeBRETON INSURANCE AGENCY
formerly
Roy Martin & Co., Inc.
New Orleans, La.

Sheet NO. 1

Company Manufacturers Casualty Ins.Co. Premiums Written Month January 1951 Agent Chester Wooton Code NO.

Cl Sym	Policy No.	Assured	Auto P.L. P.D. & Med.	Auto Fire Theft & Comp	Auto Coll.	Gen. P.L. P.D & Coll	30% Bonds	Comp-ensa-tion	Plate Glass	Burglary	Fire. Torn. & Ext. Cov.	Marine		Total Premium	Expira-tion	Remarks
							15%									
	42614	Dewey Cognevich					9.00						Assessors	9.00		
	70523	Jos. E.Williams					35.00						Off.	35.00		
	42695	J.M.Williams					5.00						Bid	5.00		
	42694	J.M.Williams					5.00						Bid	5.00		
							54.00							54.00		

37.

MARTIN-LeBRETON INSURANCE AGENCY
formerly
Roy Martin & Co., Inc.
New Orleans, La.

Sheet No. Recap

Company Manufacturers Cas.Ins.Co. Premiums Written Month Jan, 1951 Agent _____ Code No. _____

Cl. Sym.	Policy No.	Assured	Auto P.L. P.D.& Med.	Auto, Fire, Theft & Comp.	Auto Coll.	Gen. P.L. P.D. & Coll.	30% Bonds	Com pen sat ion	Plate Glass	Burg- lary	Fire, Torn,& Ext. Cov.	Marine		Total Premium	Expira- tion	Remark
		Direct					318.85							318.85		
		Wooton					54.00							54.00		
		Direct					75.00							75.00		
		Net Prems.					297.85							297.85		
		Less Com.												89.36		
		Net due Co.												208.49		

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Sheet No. 1

ROY MARTIN & COMPANY
New Orleans, La.

Company Manufacturers Casualty Co. Return Premiums For Month January 1951 Agent Direct Code No. _____

Cl Sym.	Policy No.	Assured	Aut. P.L. P.D. & Med.	Auto Fire Theft & Comp	Auto Coll.	en. P.L. P.D. & Coll	30% Bonds	Compen- sation	Plate Glass	Burglary	Fire, Torn. & Ext. Cov.	Marine		Total Premium	Expira- tion	Remark
	42664	Delcuze & Weaver Co.					75.00						leb	75.00		

MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

(Number and title omitted) (Received: April 3, 1956)

Estoppel, an affirmative defense in abatement, where the facts are admitted or not seriously controverted and nothing could be added by a formal trial of the issues, may be properly presented and tried by Motion to Dismiss under Federal Rule 12(b). 1/

The rule is well established that where an agent has committed an alleged breach of instructions in issuing an insurance policy, and the principal nevertheless adopts his acts, accepts the premium on the policy and fulfills and carries out all the obligations and undertakings of the insurance policy, the act of the agent is completely ratified, the principal is bound, and the agent is discharged from all personal liability in the premises. 2/

1/ Larter & Sons v. Dinkler Hotel Company, 5 Cir., 199 Fed. 2nd 254; Chappell v. Gottsman, 5 Cir., 186 Fed. 2d 215; Barton v. Arkansas Natural Gas Corporation, 32[illegible] U.S. 620, 64 S.Crt. 724, 88 L. Ed. 967; Lanham v. Howell, 5 Cir., 200 Fed. 2d 799; LeBlanc v. Southern Products Co., 5 Cir., 202 Fed. 2d 245; Moore's Fed. Practice (Second Edition), Vol. 2, p. 2228, Sect. 12.04.

2/ Succession of Gilmore, 154 La. 105, 97 So. 330; Szymanski v. S. Plassan, 20 La. Ann. 90; Ward v. Warfield, 3 La. Ann. 468.

The act of an insurance agent is validated and the policy itself fully recognized even by the act, standing alone, of the acceptance by the company of the premium on the policy. An insurance company cannot accept the premiums on a policy and deny its obligations. 3/

The law appears to be well settled that one to whom a check is tendered in payment of a debt, may either accept or reject it; but may not accept and retain the check and at the same time question or disavow the obligation or the settlement. 4/

Neither law, equity nor good conscience will allow one to claim the benefits and at the same time escape the obligations of an undertaking. 5/

An unauthorized contract of an agent is ratified by the principal who, when notified of such contract, does not immediately repudiate it, but accepts the benefits under such contract. 6/

3/ Coci v. New York Life Insurance Co., 155 La. 1060, 99 So. 871; Georgia Home Insurance Co. v. City of Smithville, Tex. Civ. App. 44 S.W. 412.

4/ Peavy-Welsh Lumber Co. v. Hendrix, 4 Cir. (a case controlled by Louisiana Law), 139 Fed. 2d 403; Henriques v. Vaccaro, 220 La.216, 56 So. 2d 236; Berger v. Quintero, 170 La.37, 127 So. 356.

5/ Burk v. Livingston Parish School Board, 190 La.504, 182 So. 656

6/ Succession of Gilmore, 154 La. 105, 97 So.330; Ward v. Warfield Warfield, 3 La. Ann. 468; Flower v. Downs, 6 La. Ann. 540; Scymanski v. Plassan, 20 La. Ann. 92, 96 Am. Dec. 382; Mangum v. Bell, 20 La. Ann. 215, R.C.C., Art. 3010.

"The retention of money paid to an insurance company, with knowledge of facts which might render the policy void, ratifies the contract as subsisting obligation. 7/

If the policy was valid to earn premiums, it remained valid to bind the insurere for losses occurring in the meantime. 8/

In support of the Motion to Dismiss, and the authorities herein quoted, there is annexed thereto the affidavit of George E. Martin, Esq., one of the defendants herein, and the pertinent exhibits in support of said affidavit, and moves the court that the complaint of the complainant be dismissed, and summary judgment be rendered.

RESPECTFULLY SUBMITTED,

Normann & Normann

(s) F. Normann

7/ Mathews v. Metropolitan Life Ins. Co., 147 N.C. 339, 61 S.E. 192; Masonic Life Ins. Co. v. Robinson, 149 Ky. 80, 147 S.W. 882; State Mutual Insurance Co. v. Green, Oklahoma, 166 Pac. 105; McQuillen v. Mutual Reserve Life Ins. Co., 112 Wis. 665, 87 N.W. 1069; W.B. Walker & Sons v. Hernandez, 42 Tex. Civ. App. 543, 92 S.W. 1067.

8/ Mrs. Anna M. Graff v. Sovereign Camp, Security Degree, Woodmen of the World, Orleans Appeals, 1 La. App. 119. (Writ of review refused by Louisiana Supreme Court.)

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MEMORANDUM ON BEHALF OF COMPLAINANT IN ANSWER TO DEFENDANT'S MOTION TO DISMISS

(Number and title omitted) (Received: June 26, 1956)

MAY IT PLEASE THE COURT:

Defendant was the agent in New Orleans for complainant to write insurance. The Agent was given certain limited authority as set forth in the Agency Agreement (Exhibit Complainant I) and the Instruction and Limitations Governing The Use of Power of Attorney (Exhibit CII).

The Agent had no authority to write contract performance bonds.

On January 12, 1951 the Agent sent a night letter telegram to the Principal advising that one James H. Geiger dba Bennette's Contracting Company was the successful bidder in a small painting job for $2,780.00 for the Orlears Parish School Board and requesting authorization to execute a contract performance bond for him. (Exhibit C-III.)

Also on January 12, 1951, the Agent followed the above by Airmail Special Delivery letter requesting authorization by wire to execute this bond for $2,780.00. In this letter mention was made that Geiger had a bid out for $13,800.00 and that he might be awarded that contract also. (Exhibit C - IV)

On January 12, 1951 the Principal sent a telegram to the Agent reading as follows:

> "Prefer not to authorize painting bond James H.Geiger without full investigation. Writing." (Exhibit C-V)

The Principal wrote to the Agent on January 12, 1951

requesting additional information with regard to Geiger. (Exhibit D - 1)

On January 23, 1951 the Principal sent a telegram to the Agent reading as follows:

> "Authorize contract bond Two Thousand Seven Hundred Eighty Dollars, James H. Geiger." (Exhibit D-2)

On January 23, 1951, the Principal wrote to the Agent confirming the telegram of same date and requesting additional information concerning the request for bond of $13,800.00 (Exhibit D-3).

The bond for $13,800.00 was executed by the Agent on January 25, 1951. No authorization to execute said bond was ever given by the Principal.

On January 29, 1951 the contract and the contract performance bond were placed on record by the Owner in Book 1818, Folio 376 of the Mortgage Officer for the Parish of Orleans.

On February 3, 1951 the Agent wrote to the Principal advising that it had written the bond for $13,800.00 (Exhibit D-4).

On March 21, 1951 the Principal wrote to the Agent advising that it would hold the Agent liable for any loss which the Principal might sustain by reason of the execution of the bond in violation of the authority of the Agent. (Exhibit C-VI)

A review of the affidavit of Mr. George E. Martin, of the defendant Agent, and the exhibits filed by both parties to this action shows beyond doubt that the Agent was at all times fully cognizant of the fact that he had no authority to execute the contract bond for $13,800.00. He requested and received

authorization to execute the bond for $2,780.00. He several times asked to be permitted to sign the bond for $3,800.00. In spite of the fact that no such authorization was given to him, he, nevertheless, executed said contract bond.

The contract bond actually was signed by the Agent and placed of record in the Mortgage Office before the Agent notified the Principal that it was executed.

It is contended by the defendant that had the complainant notified the interested parties of their decision to withdraw from the bond, then the contractor could have made arrangements to place the bond elsewhere. This was impossible. The Louisiana Revised Statutes of 1950, LSA - R.S. 9:4802 requires the bond to be attached to and recorded with the building contract. Therefore, it was impossible for the contractor to secure another bond.

The contract bond here was a surety bond. It was written for the benefit of the Owner and every laborer, subcontractor, materialman, etc., who worked on the job. The rights of these third parties became fixed immediately upon recordation of the bond and contract. In the circumstances here presented, no Court would have permitted the Surety to escape liability to these innocent third parties. The defendant was the Agent of Complainant. Its powers were limited; however, this could not be known to these third parties. As far as they were concerned, the Agent appeared to have the necessary authority, especially since he had express authority to execute the bond for $2,780.00

A Surety on a building contract bond may not avoid the contract of surety even though he was induced to execute the bond by fraud, where the Creditor or Obligee was not connected with the fraud. Tooke v. Burke, 141 La. 746, 75 So. 668.

In the same case it was pointed out that a Surety could not withdraw at any time and be bound only for what had been done up to the time of the withdrawal.

A surety on a building contract bond is liable, even though he received no compensation. McDonald v. Harris Gas & Oil Co., Inc., 2 La. App. 241.

As between the Principal and the Agent, the true limit of the Agent's authority to bind the former is the express authority or instruction given to the Agent: but as between the Principal and third persons, the true limit is the apparent authority with which the agent is invested. Interstate Electric Co. v. Frank Adam Electric Co., 136 So. 283, 173, La. 103.

Accordingly, it would have been a vain and useless thing for the Surety here to deny liability to the innocent Owner and to the innocent materialman, Apex Sales Company, which had filed a lien for $2,310.08. To do so would simply have resulted in protracted litigation and increased loss. Instead the Surety notified the Agent that it would look to the Agent for reimbursement or whatever loss it sustained; and then quite properly took hold of the situation, secured bids for completion of the work, awarded the contract to the successful bidder, completed the work, adjusted the lien claim and thus minimized the loss.

The Surety now, again quite properly, looks to the Agent for reimbursement of that loss because of his acts in violation of his authority. It has a right to do so. Article 3003, Louisiana Civil Code of 1870.

No question of prescription is involved for actions such as these prescribe in ten years. Article 3544, Louisiana Civil Code of 1870. Wagoner v. Phillips, 22 La. App. 151.

In the case of American Fire and Marine Ins. Co. v. Seymour, 144 So. 775, the agent issued two liability policies covering the operation of two trucks in violation of its authority. When notice reached the insurance company, it notified the Agent that the A ent had assumed liability because of the violation of instructions just as in the instant case. The insurance company also cancelled the policies which we have seen could not be done here with the contract performance bond. The insurance company was sued by the insured in two suits which resulted in two judgments being rendered against it.

The insurance company then sued the Agent to recover its loss. The Agent made a number of defenses among which was estoppel. The Court pointed out that the law does not favor estoppels, held the remaining defenses untenable and rendered judgment against the Agent.

The cases discussed by the defendant in brief are not in point here. They deal with the obligation of a Surety towards a third party. None of said cases has reference to the right of a Principal to recover from its Agent for an unauthorized act.

It is respectfully submitted that defendant's motion to dismiss should be overruled.

Respectfully submitted,

(s) Parnell J. Hyland

By: F.C.Johnson,Jr.

...oOo...

EXHIBIT C-III ANNEXED TO FOREGOING BRIEF

UX NEW ORLEANS LA 11 Received - Jan. 12, 1951
BOND DEPARTMENT

J. H DODGE, MANUFACTURERS CASUALTY INS. CO.

1617 PENNSYLVANIA BLVD PHILA

JAMES H. GEIGER DBA BENNETTE'S CONTRACTING CO HAS BEEN RECOMMENDED TO US. DUNN & BRADSTREET HAVE NO INFORMATION HIM. HE HAS BEEN THE SUCCESSFUL BIDDER ON A SMALL PAINTING JOB FOR $2780. FOR THE ORLEANS PARISH SCHOOL BOARD. HE WAS LOW BIDDER BY $115. THIS IS HIS FIRST JOB ON HIS OWN. HE HAS HAD 10 YRS EXPERIENCE IN THE BUSINESS. TOTAL ASSETS $7174. CASH $3520. ACCOUNTS RECEIVABLE $1400. FIXED ASSETS $2200. NO LIABILITIES: PLEASE WIRE AUTHORIZATION TO EXECUTE THIS BOND AS WELL AS TEMPORARY AUTHORIZATION TO WRITE BONDS BUT NOT OVER 3 or 4 TIMES THE PRINCIPAL'S LIQUID NET WORTH PENDING YOUR COMPLETE INVESTIGATION MARTIN LEBRETON INS AGENCY

& $2780 $115 10 $7174 $3520 $1400 $2200 3 4

(30)

(927 AM JAN 12 51)

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EXHIBIT ANNEXED TO FOREGOING BRIEF C-IV

MARTIN-LeBRETON INSURANCE AGENCY
formerly

Roy Martin & Company
Insurance of all kinds
208 Strand Building 231 Baronne St.
New Orleans 12, La.

Phone: RA 9936

Received
Jan. 15, 1951
Bond Dept.

January 12, 1951

AIRMAIL

SPECIAL DELIVERY

Mr. J. H. Dodge
Manufacturers Casualty Company
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Dear Mr. Dodge: RE: Mr. James H. Geiger

Thank you for your wire. We verified the assured's cash of $3,520.00. I have also spot-checked the firms which he has done business with. They highly recommend him. In fact, Mr. Smith of Pittsburgh Plate Glass Company who has had considerable dealing with Mr. Geiger informed me that Mr. Geiger previously ran a job for the Lafayette School for the Orleans Parish School Board, as well as a job on the Federal Post Office. He tells me that while operating these jobs, Mr. Geiger had a working interest in the Creto Company who always discounted their bills. He also stated that Mr. Geiger knows his business thoroughly and he is conscientious and honest.

Mr. Geiger, I am quite sure will be formally awarded the contract referred to in my letter of $2,780.00 on Monday and he has a bid out of $13,800.00 on which there is a possibility he may also be awarded that contract. This makes a total of $16,580.00.

We would like to get this man started and in the light of this additional information which I have developed for you I would appreciate your letting us have authorization by wire.

Yours very truly,

MARTIN-LeBRETON INS. AGENCY

...oOo...

EXHIBIT C-V BEING ANNEXED TO FOREGOING BRIEF

GA WU F

MC 3 PD CHG SG 1/12/51

MARTIN-LEBRETON INSURANCE AGENCY

208 STRAND BUILDING

231 BARONNE STREET

NEW ORLXXX NEW ORLEANS 12 LA.

PREFER NOT TO AUTHORIZE PAINTING BOND JAMES H. GEIGER WITHOUT FULL INVESTIGATION. WRITING.

J. H. DODGE

MANUFACTURERS CASUALTY INSURANCE COMPANY

3 WU G 1205P TU

...oOo...

EXHIBIT C-VI ANNEXED TO FOREGOING BRIEF

March 21, 1951

Martin-LeBreton Insurance Agency
208 Strand Building
231 Baronne Street
New Orleans 12, La.

Re: Bond 42699 - James H.Geiger dba Bennett's Contracting Co.

Gentlemen:

We are indeed surprised to receive execution report from your office advising that you had executed the above captioned bond in the amount of $13,800. for James H. Geiger, doing business as Bennette's Contracting Company, for waterproofing exterior of Warren Easton High School, New Orleans, La., without having authority from this office for the execution of the bond.

Your files will clearly indicate we did not authorize execution of this bond and in fact we wrote you on January 23rd advising that we were not authorizing the bond. We also wired you on January 30th not to execute this bond.

At the time power of attorney was give you we issued to you underwriting instructions, by the terms of which you agreed to submit all contract bonds to this office for approval before execution. We have copy of Limitations of Authority signed by both G. E. Martin and Edward F. LeBreton, Jr.

Since you have violated your underwriting instructions and agreement in connection with the issuance of this bond, we will expect to hold you responsible for any loss which we may sustain by reason of the execution of this bond in violation of your authority.

Yours very truly,

Wm. H. Caudill
Vice President

WHC/h

...oOo...

SUPPLEMENTAL MEMORANDUM OF DEFENDANT REPLYING TO COMPLAINANT'S ANSWER TO THE MOTION FOR SUMMARY JUDGMENT

(Number and title omitted) (Received: June 26, 1956)

The Defendant's Motion to Dismiss and for Summary Judgment was based on two grounds:

1. The insurer -principal never disavowed the contract but assumed control in its own discretion of the entire situation as insurer, and actually collected the premium on the policy.

2. An insurer -principal cannot blow hot and cold. To take every step incumbent on a principal and especially to receive and accept the premium which is the consideration for the issuance of the policy amounts to a complete affirmance of the contract and constitutes full ratification of the authority of the agent who issued the policy on behalf of the principal.

Martin-LeBreton, who certainly acted in good faith, reported the execution of the Bond within a few days of its signature. In 1951, there was an intervening Saturday and Sunday between February 25, when the Bond was signed, and February 3 when they notified the insurer. The insurere does not complain of any delay in receiving notice, but claims that, when once the bond was recorded with the contract on January 29, the hands of the insurer, if indeed it wanted to disavow and repudiate the contract, were tied. That surely is not so. If indeed the insurer considered that it was not bound by the agent's signature, all that the law required was that the insurere should act with reasonable promptness for its rescission and cancallation.

Their long delay, - from February 3 to March 21, - forty-six days, shows that there was no repudiation of the agent's signature and authority. What we submit actually happened was that the insurer took this long delay to reach a conclusions as to whether it would be "good business" to go along with the agreement. They did reach that conclusion after forty-six days, and then wrote Martin-LeBreton that they were going ahead with the contract, but would hold them as agents liable for any loss, - in law an impossible and self-contradictory situation for a principal who cannot straddle the effect of an agent's signature, but, acting promptly, must either affirm or deny it.

The law is well settled (and in their Memorandum our friends say not one word questioning the numerous authorities

cited by defendant) that when a principal is advised that an agent has signed a contract, if the principal believes that the contract exceeded the mandate, it must immediately disavow the contract. If indeed there was no contract binding on the complainant because of Martin-LeBreton's asserted lack of authority, that presented a definite situation which the Courts everywhere have had to deal with on many occasions, and it called, under the established jusisprudence, for immediate action on the part of the principal.

An immediate notice to all interested parties that it claimed its signature to the bond had been improperly affixed by an unauthorized agent was the usual way in which the complainant might give definite and unqualified information and knowledge of its position. After all, if the complainant really believed that the agent had improperly signed, public notice of this was called for immediately.

Surely, the complainant will not pretend that it could not have acted at once or that it would have indulged in the slightest delay in repudiation of the signature to the bond as surety, if that signature had been an outright forgery. And essentially, to some degree, that appears to be its present claim, viz. that its signature was affixed to the bond illegally, with no authority whatever, on the part of the insurer's representative.

Will it be pretended that, if that was the true situation, the complainant must carry out the contract, because, as it claims in its counsel's memorandum, its hands were tied?

Of course not. A public notice and warning and probably a suit against the School Board and the alleged agent to cancel the contract and to remove its inscription from the public records, would have straightened out the entire situation halted those who otherwise might have acted on the belief that the bond as recorded was binding on the named surety and would have completely protected the complainant if it really desired to question its agent's signature and to disavow any liability on the bond.

Our opponents as a last resort call attention to the fact that under the statute the bond and the contract for the work were filed for record together. Is that a sound reason for denying to a surety company, which acts promptly for the cancellation of its undertaking, the right to give public notice or to file an action to have it decreed that the bond is forged, or at least as is the case here, is claimed to be an ineffective and valueless piece of paper for the asserted reason that the representative who signed it lacked all authority to act?

When on February 3, the complainant was advised that Martin-Le Breton had signed this bond, the contract and the bond had been on the public records only five days, - from January 29 when the recordation was made until February 3, when the alleged principal was notified. That was a very slight period of time for work to be done on the job or even for subcontracts either for labor or material to be entered into with reference to said bond. And, of course, no one could depend on the bond or do anything with reference to this contract by

way of labor or furnishing of materials until the said contract and bond had been actually placed on the public records. Under the very statute cited by our opponents in the present case, R.S. 9:4802, "the contract....shall be recorded in the office of the clerk of court or recorded of mortgages of the parish wherein said work is to be executed before the date on which the work is to begin". Therefore, no work could begin and no claim could possibly exist under this bond except for such slight activity as might have taken place on the part of the materialmen, subcontractors and laborers, during the short period between January 29 and February 3, really three days, as the day of the inscription can hardly be counted and February 3 was a Saturday in the year 1951.

It is clear, as we submit, that if the surety was not liable at all, - and it was not, if the agent lacked all authority to execute the bond-, and if the complainant sincerely wished to repudiate the agent's signature, the situation was clear-cut, free from all doubt; and all the surety was called to do was to give public notice of non-liability, possibly file a suit which would have been the most striking type of public information, stick without deviation to its assertion that it was not legally or actually a party to the bond which it repudiated in its entirety and would have nothing to do with.

But, instead of proceeding in that way, the complainant waits forty-six days, - from February 3 to March 21 -, to reach its decision, and then, pretending not to be bound, takes hold of the entire situation, tells the School Board exactly how the work

is to be done by it with a contractor of the surety's own choosing, and undertakes to carry out and fulfill the entire undertaking, collects the full contract price from the owner School Board, does all this without a word of consent or agreement with the agent, and then when it has fulfilled the contract which it thus voluntarily adopted in every particular, the surety turns around and sues the agent for what it considers and claims to be its "loss" on said contract.

In point of fact, there never should have been any loss, unless we can think that a subcontractor, or materialman, or a laborer, during the three working days that elapsed between the recordation of the bond and contract on January 29 and the notice to the complainant that the agent had signed the bond, put in a few hours of work or delivered some slight building material, all of which could not have amounted to much and as to the material could have taken away when the surety, acting, promptly, gave public notice that the bond was illegal and, as it claimed, not signed with its authority. But, far from doing this, the complainant, for some reason of its own, decided to go on with the contract; never questioned the contract publicly; allowed it to remain on the public records, so that laborers and materialmen might know that it was the surety, liable for all claims like any other surety under a bond duly signed by its authorized agent and representative. How can the surety now, in good conscience, say that the agent is responsible for the loss? That loss, as can readily be seen, could have been easily avoided, and not having done what was

incumbent upon it if the complainant desired to rescind this contract, but on the contrary having carried out the contract and allowed it to remain as a valid and binding obligation on the public records, and having completely carried out the undertaking based on the contract and the bond secured by the agent, the surety is in fairness or in law in no position to try to make the agent liable for any loss, and the complainant's suit is not well founded.

Buy beyond all that has gone before, there is another and compelling reason why the Surety Company adopted the contract and recognised the Bond.

How can any reasonable person deny the existence of a contract or the validity of a bond or insurance policy, and at the time receive and collect and hold for its benefit the price of the contract, - the premium on the bond.

The authorities collected in the memorandum which accompanied defendant's Motion for Summary Judgment herein, convincingly show that to repudiate an undertaking and in the same breath to collect the premium which is the consideration for going on with and fulfilling the contract,- connotes a situation as utterly impossible in law as it is in the ordinary affairs of men.

A surety cannot collect the premium on a bond and at the same time repudiate the bond. Argument on such a self-evident proposition is not only really unnecessary, but is buttressed, as might be expected, by numerous authorities from the Louisiana and the Federal Courts.

This surety, the complainant herein, received the premium covering the issuance of its bond on this School Board job, and kept it, and that, it is submitted, should properly be the end of the present case. The complete silence of their counsel's memorandum, in the face of the defendant's Motion to Dismiss and for Summary Judgment on that very point duly proved by the averments of defendant's accompanying proof, demonstrates that the complainant, which received the premium for this bond executed by its representative, can have no claim to question the signature of the agent on this bond.

The authorities referred to in complainant's memorandum are neither applicable nor pertinent to the issues presented by this case. The case of American Fire & Marine Ins. Co. v. Seymour, La. App., 144 So. 775, advanced by complainant concerns a local agent who wrote two policies covering newspaper trucks. This was forbidden under plain terms of agent's instructions.

The policies were written on August 2, 1930. One accident occurred on August 5, 1930; the other on August 12, 1930. The Company immediately cancelled the policies. It seems to have been assumed by the Court that the insurer was liable on the policies issued and signed by a regular agent. The insurer paid the loss amounting to some $700.00.

The Court held that the loss was due to the agent's unauthorised act and(of course, this completely distinguishes this case from our own) since the company had never ratified the act of the agent in any way, it was proper that the agent should bear the loss resulting from his failure to follow

the instructions which, as was seriously argued in that case, he did not think it was necessary for him to read.

This case really is an open and shut case of complete failure to follow the instructions which were specific. The losses occurred before the insurer had a reasonable opportunity to even see the policies and to discover they violated the specific instructions. The insurer, the moment it knew of the loss (due to collision with a truck not included in the policy) cancelled the contract. The case in no manner approaches the Martin-LeBreton case where the premium was collected by the insurer and the insurer by fully acting as such, ratified the agent's original agreement.

McDonald vs. Harris Gas & Oil Co., Inc., 2 La. App.241, has no bearing whatever on the present case.

Of course, the apparent limit of authority controls between the insurer and third persons, as held in Interstate Electric Co. vs. Frank Adam Electric Co., 173 La. 103, 136 So. 283, whereas the true limit of the agent's authority so far as his principal is concerned is a question of fact. By the same rule, ratification between the principal-insurer and his agent is also a matter of fact, and when the insurer has taken charge of the entire matter and handled the loss as insurer, and principally where the insurer has collected and kept the premium, how can it be argued that, as between the principal and agent, there has been no ratification?

Article 3003 has no application where the acts of the agent have been ratified.

Of course, no question of prescription has been pleaded, a manifestly none is involved herein. Wagoner vs. Phillips is without pertinency here.

All of which is

RESPECTFULLY SUBMITTED,

NORMANN & NORMANN
by: (s) F. Normann

...oOo...

SUPPLEMENTAL MEMORANDUM OF COMPLAINANT IN ANSWER TO DEFENDANT'S MOTION TO DISMISS

(Number and title omitted) (Received:)

Contrary to the opinion of counsel for defendant, we submit to Your Honor that the agent here did not act in good faith. For some reason the agent was particularly desirous of securing the bond business of the contractor Geiger and was willing to go to any length in order to secure such business. Martin-LeBreton knew perfectly well that it had no authority whatsoever to write the performance bond for $13,800.00 nor to write any other bond. Under the Agency Agreement and the Instructions and Limitations Governing The Use of Power of Attorney the authority of the agent was clearly and well defined. The agent knew that it had no right to execute bonds. It requested and was eventually given authority to sign a performance bond for Geiger for $2,780.00. It requested permission to execute the larger bond for $13,800.00. This authority was never given. In spite of this, the agent signed the large bond and permitted it to be recorded before it even notified its principal. How then, can the agent claim good faith?

Its entire action was selfserving and an obvious attempt on its part to impose its will upon the principal.

It is well settled in Louisiana that the office of Mandate carrier with it the responsibility of strict adherence to duty. The utmost good faith and loyalty is exacted in all the dealings of an agent, touching the interest of his principal. Meeker vs. York, 1858, 13 La. Ann 18; Assunto vs. Coleman, 1925, 158 La. 537, 104 So. 318.

Certainly, if Your Honor entertains any doubt in this matter, it should not be resolved in favor of this agent which deliberately violated its mandate. This is not a case of a technical violation nor a possible misinterpretation of the terms of a mandate or of instructions. It is a willful, wanton misfeasance.

The agent was out to get the business of Geirger and was determined to do so even if it meant going to the extent of violating the express provision of the mandate. Surely, this not to be counteranced or the principal made to suffer merely because the agent was not sooner notified that it would be held accountable for any loss sustained as a result of its wrongful act.

The wrongdoer now contends that something else was required to be done by the innocent principal before it could hold the agent liable. The principal must notify all interested parties and then sue the innocent School Board and the agent to cancel the inscription. What about the innocent contractor and the even more innocent materialmen, laborers, sub-contractors

journeymen, cartmen, workmen, mechanics, etc.? Should all these have been ferreted out by the principal and sued too? Your Honor can imagine the damage suits that would have been brought against the principal if any such course had been followed.

Further, what good would have been accomplished? LSA R.S. 9:4802 requires that the bond be recorded with contract and from that moment the surety is bound. In the circumstances here presented, no court would have permitted the principal to escape liability. It would be said - and rightfully - that this was a matter between the agent and principal for which the innocent third parties should not be made to suffer.

Thus, the course suggested by the wrongdoer now seeking to escape liability would have resulted only in additional expense.

We have already seen that a surety may not avoid the contract of surety even though he was induced to execute the contract by fraud, where the creditor was not connected with the fraud. In addition, a surety cannot withdraw at any time, as suggested by the agent, and be bound only for what was done up to the time of the withdrawal.

Could the School Board and the contractor have secured another surety? The answer is no. LSA R.S. 9-4806 provides that "If the bond is found to be insufficient in amount of not to have a proper and solvent Surety, or if no bond has been furnished or recorded within the time hereinabove provided, but the contract has been timely recorded, the owner shall be personally liable to sub-contractors, journeymen, cartmen, workmen, laborers, mechanics, furnishers of material, or any

other person furnishing labor, skill or material on the said work ----- "Underscoring ours)

Thus, the law gives the owner but one opportunity to obtain a proper Surety and that is before the work is commenced. If he fails to do so, he is personally liable. Nothing that occurs thereafter can alter his liability.

Actually, even if it were possible by law, what insurance company would become Surety On a contract where the work had been already commenced? It would require a most extensive investigation to determine the possible liability to which it might already be exposed even before the surety executed the Surety Contract. No company in the world would accept that sort of business even if it could do so.

The wrongdoer contends also that the principal waited some time before reaching a decision. This is not borne out by the facts. The decision was made in the Agency Agreement and in the Instructions under the express terms of which the agent had no authority to execute performance bonds or any bonds. It was made also, in the negative reply of the principal to the agent when authority was requested to execute the substantial bond. All of this was ignored and disregarded by the agent.

The agent also contends that there should never have been any "loss". With this we agree. The loss could easily have been averted if the agent merely had acted in good faith and adhered to its mandate.

We have already seen the damages that would have been sustained by the School Board, and the contractor as well as the

materialmen, laborers, etc., if the principal had sought to repudiate the wrongful act of its agent. For all of these it is certain that suits would have been brought and the "loss" would have been much greater.

The agent next contends that there is another and "compelling" reason which shows that the principal recognized the bond. That is, that the principal collected the premium.

A reference to the copy of the execution report and of the check attached to the affidavit of Mr. Martin will show that the remittance by the agent for premiums written in the month of January, 1951, was not made until well into March, 1951. The execution report is not dated. The check is dated March 8, 1951. It is impossible to discern when the report was mailed. The stamp on the reverse side of the check, which is not clear, would appear to indicate that the check was deposited on March 13, 1951. By that time the job was in such a stage that a loss under the bond was contemplated. Thus, it was not the principal but the agent which collected, kept and used the premium on the bond until at least such time as a possible loss became imminent.

On March 16, 1951, the agent wrote to the Claim Department of Manufacturers Casualty Insurance Company advising that there was evidence of a possible loss under the bond. (Defendant-1) All of its previous communications in connection with the matter had been addressed to Mr. J. H. Dodge, Superintendent of the Contract Department of the insurance company. On March 21, 1951, Mr. Wm. H. Caudill, Vice-President of the insurance

company, wrote to the agent (C-VI) referring evidently, to the execution report making remittance for the month of January, 1951, which had obviously been received by the company just a few days prior to the date of his letter, expressing surprise that the agent had executed the bond in violation of express instructions not to do so and advising further that the agent would be held liable for any loss sustained.

Surely, there was nothing required to be done by this innocent principal in order to be able to assert this claim for reimbursement from this bad faith agent.

Was the agent prejudiced in any manner after its wrongful act by any action and/or omission on the part of the principal? Was there anything which the agent could have done to prevent or to minimize the loss which it was prevented from doing by the principal? The answer to each of these questions is no. Such being the case, how can it be argued that the innocent principal is not entitled to its day in Court?

If the principal had handled this matter in any other manner the loss sustained would have been far graater. By judicious use of the resources, knowledge and experience at its command the loss was reduced to a minimum. An example of this in the fact that the lien filed by the Apex Sales Company for $2310.08 was actually compromised for $1,011.49.

The agent makes much of the fact that it rendered assistance to the principal in hving the work completed after default by the contractor. Of course, this was in the interest of the agent sure it had already been notified that it would be

held liable for the loss.

The agent next seeks to draw fine distinctions between this case and that of American Fire & Marine Insurance Co., vs. Seymour, La. App. 144 So. 775 which is referred to in our original brief. Actually, the cases are very similar except that in the Seymour Case the agent wrote two liability policies covering motor vehicles. In both cases that was lack of authority, although the instant case represents an event more flagrant violation of a mandate since the agent here requested authority and an express and definite denial was made by the principal. In the Seymour Case the principal was able to cancel the policies and thus to forestall additional losses. Unfortunately, as we have seen, the principal here could not do this since this case involved a recorded performance bond under which work had already been commenced.

As between these two parties, the innocent should not be made to suffer. The principal is entitled, at least, to its day in Court. It is respectfully submitted that the motion of defendant should be dismissed.

Respectfull submitted,

(s) Parnell J. Hyland
Attorney for Complainant

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SECOND SUPPLEMENTAL MEMORANDUM OF DEFENDANT REPLYING TO FIRST SUPPLEMENTAL MEMORANDUM OF COMPLAINANT'S ANSWER TO THE MOTION FOR SUMMARY JUDGMENT

(Number and title omitted) (Received: August 27, 1956)

We are somewhat shocked by the charge of bad faith which

the Complainant, who has been very shaky on the issues legitimately presented in this case, has seen fit to press, in its supplemental memorandum against the Defendant.

Can it be fairly said that the Defendant tried to impose its will or to deliberately cause a loss to their principal, the Complainant? We refuse to believe, and we do not believe, that the Complainant can suggest with any degree of cogency, that Complainant's agent ever had the slightest thought of harming its principal or involving said principal in any losing venture.

The Defendant hid nothing from its principal; but on February 3, within five days (including a Saturday and a Sunday) of the recordation on January 29 of the contract and bond, gave due and prompt notice and advice to its principal of the writing of this bond.

There is, therefore, little basis for any attack on the Defendant on the ground of disloyalty or a wanton disregard of its duty to its principal.

Nor, after these many months, can the Insurance Company complain it received no proer notice of the execution of this Bond.

When, with reasonable promptness, it was notified within three business days as above stated, it was the Complaint which failed, for some reason of its own, to do what the law and the jurisprudence plainly required should be done, if, in point of fact, Complainant did not approve the contract made by its agent.

On the contrary, as we will show, the Complainant approved the contract and made it its own, not only by failing to repudiate it for forty-six days, but principally by accepting the premium earned by the risk on said contract, thus completely and wholly validating its execution by its agent.

The Complainant, when notice of the execution of this contract and bond reached it, was called upon, at that point and without delay, either to ratify the engagement (as, in point of fact, we think that it did), or then to take immediate, appropriate action to publicly disavow and rescind the agreement. We think the undisputed facts in this case show the Complainant actually accepted the contract and ratified the Bond.

Our opponents again urge to the Court the Complainant could not rescind because the Bond had already been recorded. But that argument is not well founded, since they claim now that they were not bound by the contract and bond signed by their agent, and, therefore, there was no suretyship. It is certainly unsound to claim that the mere registry of a bond could prevent a surety, suing promptly, to show the absolute nullity of the undertaking.

The transaction, when Complainant received notice of it, was about five days old. Since the Company now claims that it was not bound, it might have done several things to protect itself. It could have recorded a formal notice of non-liability in the Mortgage Office. It could have caused a newspaper advertisement to be published denying its liability. It might finally have brought a simple suit, the very institution of

which, especially if coupled with a lis pendens in the Mortgage Office, would have constituted notice to the world that, according to its appreciation of the facts, there was no contract and no bond. But as pointed out in our first supplemental memorandum, none of this was done.

And our opponents further argue, why should they have been called on to do anything. The short answer is, that the law and the jurisprudence compelled them to act, and probably, if their claim was well founded and the bond was cancelled, any expense incurred might have been charged to the Defendant.

It is certain that, if the Complainant wanted to disavow the act of its agent, claimed to be unauthorized, it had to perform acts and take steps indicative of such repudiation, and this had to be done without delay.

It stands to reason that, in such a situation, Complainant could not remain perfectly quiescent and allow possible rights to continue to mature, and then come in on the forty-sixty day to say that, after that unnecessary and inordinate delay, it would hold the agent liable for an unauthorized act.

If Complainant had done what was proper and necessary, ie had acted immediately, as would any prudent businessman upon discovering that he had been embroiled in a venture by the act of an unauthorized representative, it may be that the agent might have been held in some amount of damages, but such a claim would have been, and could have been, only for the loss accruing and accrued during the intervening period of approximately six days or so between the date of the signing

of the bond and the date of the public notice and warning of repudiation thus intended and required by law.

In addition to what has been said, we submit there is another factor which, as we think, completely settles the case in favor of the Defendant.

Here, too we have no intention of again going over and citing the decisions already filed with Defendant's Motion to Dismiss and for Summary Judgment, nor of repeating the argument originally made for Defendant.

We merely submit that the authorities cited in that Memorandum on behalf of Defendant must stand for the reason that they are sound not only in Louisiana (and this was a Louisiana contract, made and to be performed in Louisiana) but also in the United States Courts.

And particularly, let it be notied that these authorities are not questioned by our opponents, who have apparently not found one single case anywhere that would cast the slightest doubt on the doctrine on which Defendant's case is principally based in the Motion now under consideration, namely: that a surety cannot question the execution of an insurance policy, on the alleged ground of want of authority on the part of its agent who wrote the policy, and, at the same time, retain the premium which, after full knowledge of the facts, it received and accepted as consideration for the issuance of the bond.

As long as that doctrine, which is supported by so many authorities on file herein, and which is based on inevitable fairness, is recognized and applied by the Courts, it is

impossible to comprehend how there could be, in the present case, the repudiation of a contract because of a claimed want of authority, and at the same time the acceptance of the premium which is consideration for the same contract, making it binding and enforcible. Finally, the acceptance and retention by the surety of the premium on the policy in question is an entirely logical circumstance in the course of the development of the principal's ratification of the acts of its agent.

What we cannot understand, and what the courts everywhere with complete unanimity refuse to hold, is the surety's illogical and unsound position, namely, that the surety, after receiving this premium as provided for in this bond by and over the signature of the Defendant as its agent, can with propriety and justice assert that the agent who executed the same lacked authority to do so.

It is submitted that there is neither logic nor law in Complainant's position in this case, in which all the relevant facts are practically admitted; and accordingly, Defendant's request for a summary judgment, dismissing Complainant's demand, should be granted.

All of which is,

RESPECTFULLY SUBMITTED,

NORMANN & NORMANN
(s) F. Normann

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EXHIBIT DEFENDANT 1 - Letter dated March 16,1951

March 16, 1951

Claim Department
Manufacturers Casualty Ins. Co.
1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania

Gentlemen: RE: Bond #42699 - Manufacturers-
Bennette's Contracting Company

I know that you will sustain a loss under the above captioned. We have not been notified officially or unofficiallly. However, there is mounting evidence at this time to justify my opinion.

Kindly let us or your attorney have your instructions as the specifications provide that the Surety has only ten (10) days to act once they are officially notified.

Through our contracting connection, I believe we can minimize the loss and you may rely upon us for our utmost cooperation.

Yours very truly,

MARTIN-LeBRETON INS. AGENCY

GEM:dk G. E. MARTIN

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OPINION OF COURT

(Number and title omitted) (Filed: September 11, 1956)

Porteous & Johnson
William A. Porteous, Jr.,

Attorneys for Plaintiff

Normann & Normann
Frank S. Normann

Attorneys for Defendant

WRIGHT, District Judge:

The defendant herein, Martin-Lebreton Insurance Agency, general insurance brokers, was the representative and agent in New Orleans of the plaintiff, Manufacturers Casualty

Insurance Company. As such it executed a performance bond on application of one J. H. Geiger, under which the Manufacturers Casualty acted as surety for Geiger on a contract with the Orleans Parish School Board covering repair work at the Warren Easton High School in New Orleans. When Geiger defaulted, the insurance company took over the work and completed the contract. Alleging that its agent, the defendant here, executed the bond without authority, the insurer seeks judgment in the amount of $7,725.41, representing its loss on the bond. Since this is a nonjury case in which the evidence, with the exception of one uncontroverted affidavit, is all documentary, the case is ripe for disposition by summary judgment.

Martin-Lebreton received an application from J. H. Geiger requesting performance bonds covering two of his contracts, one in the amount of $2,780 and the one in suit in the amount of $13,800. Martin-Lebreton requested authority from the insurer to execute the bonds in its name covering the two contracts. By wire of January 23, 1951, authority was granted as to the $2,780 contract. On the same day the insurer also wrote a letter to Martin-Lebreton confirming the wire and stating in addition, "In regard to the bond of approximately $13,800. for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond."

On January 24, 1951, after receipt of the wire but before receiving the insurer's letter of January 23rd, Martin-Lebreton

wrote the defendant, thanking it for authorization of the $2,780 bond and advising it "we expect both the $2,780.00 and the $13,800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so." On January 25th, both bonds were executed by Martin-Lebreton in the name of the plaintiff insurer, and were, on January 29, 1951, pursuant to state law,[1] recorded with the contracts in the office of the Recorder of Mortgages for the Parish of Orleans. On receipt of the Martin-Lebreton letter of January 24th stating "we assume that it is in order to execute bonds," the insurer wired Martin-Lebreton "DO NOT EXECUTE BOND J. H. GEIGER THIRTEEN THOUSAND EIGHT HUNDRED UNLESS AUTHORIZED SEE LETTER JANUARY TWENTY THIRD." The wire was dated January 30, 1951.

On Feburary 3, 1951, Martin-Lebreton advised the insurer that both bonds had been executed, explaining that "The $13,800.00 case and the $2780.00 broke simultaneously." The letter further said "I feel sure that if you and your underwriting committee look at this case from an objective point of view, you will concur with the actions already taken." On March 8, 1951, Martin-Lebreton forwarded to the insurer its report covering insurance and bonds written by it during January, 1951, and enclosed with the report its check covering the insurer's portion of the premium on the bond in suit.

On March 16, 1951, Martin-Lebreton wrote the insurer advising that although no official notice had arrived, there

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[1] La. R. S. 9:4802

was no doubt that, by reason of the default of the contractor, a loss would be sustained on the bond in suit. On March 21, 1951 without referring to the Martin-Lebreton letter of March 16th, the insurer wrote the defendant expressing surprise at receiving the execution report covering the $13800. bond and advising that it would hold Martin-Lebreton responsible for any loss thereon. The insurance company did not at any time notify the Orleans Parish School Board, or anyone, either before or after the default of Geiger that the bond was unauthorized, nor was any attempt made to cancel the bond. On the contrary, the insurance company, after enlisting the aid of Martin-Lebreton while insisting on its right to claim reinbursement for any loss, completed the contract. Martin-Lebreton, under a disclaimer of personal liability on the bond, cooperated fully with the insurer in completing the contract.

The plaintiff contends that the Martin-Lebreton Agency was under instructions not to execute any bonds in its name without prior authority and that, as to the bond in suit, the defendant was specifically instructed not to execute it. The insurer seeks to account for its failure to act after receipt of the Martin-Lebreton letter of February 3rd, advising that the bond had been issued, on the ground that under state law,[2] since the bond had already been recorded in the Mortgage Office in the Parish of Orleans with the contract, the insurer was bound thereon and no action on its part could relieve it from its responsibility.

The defendant agency admits that the bond was executed

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[2] La. R.S. 9:4802; Tooke v. Burke, 141 La. 746, 75 So.668.

without authority. It argues, however, that in the state of the relationship between the parties, at the very least the insurer owed it a duty to disavow its action immediately, if the insurer intended so to do, in order that the agency could seek another bond from another insurer to substitute for the one in suit.

The defendant is right. Where an agent exceeds his authority, the principal may, of course, repudiate his act. But the principal may not sit back with wet finger to the wind and then deny his agent's authority. Unless repudiation immediately follows notice, the principal is deemed to have ratified the act of his agent. And this ratification discharges the agent from personal responsibility in the premises. Where, as here, repudiation by the principal may be unavailing as to third parties,[3] and the agent is sought to be held personally accountable, there still arises the duty immediately to notify the agent of disavowal, so that he may protect himself if he can. Succession of Gilmore, 154 La. 105, 97 So. 330; Oliver v. Johnson, 24 La. Ann. 460; Flower v. Downs, 6 La. Ann. 538; Ward v. Warfield, 3 La. Ann. 468.[4]

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[3] See Note 2.

[4] The only relevant case cited by plaintiff in support of its position is American Fire & Marine Ins. Co. v. Seymour, 144 So. 775, in which an insurance agent was held liable for the loss on a policy which he issued without authority from the insurer. In that case, however, notice of the claims on the policy reached the insurance company at the same time as notice of issuance of the policy. Obviously there the insurer had no opportunity to disavow the action of its agent.

Unquestionably, Martin-Lebreton acted in good faith in executing the bond. But good faith would not have protected it against its malfeasance if the insurer had acted promptly to disavow its agent's act. Instated of acting promptly, the insurer waited from February 3 until March 21, 1951 before communicating with the defendant regarding the bond. At that time it was too late to disavow its agent's action. By its own inaction, it had ratified its agent's act. By that time default on the contract was obvious and claim on the bond imminent. The insurer had been so advised by the defendant's letter of March 16. Certainly at that time all chance which the defendant may have had to place this risk with another insurer was gone. And it was gone because the insurer, through ennui or otherwise, had allowed events to follow their course without protest on its part.

The insurer's argument that there was nothing for it to do because it was bound on the bond immediately the bond was recorded with the contract misses the point. It may be true that the insurer was bound as to third parties. But as between its agent and itself, the die was not cast. The insurer had the opportunity of disavowing its agent's action by the simple expedient of advising the agent thereof, and it failed to do so. Through its inaction, it prejudiced the position of its agent and it is therefore estopped to make any claim over against that agent for its loss on the bond. By its silence where there was a duty to speak, it ratified the act of its agent and discharged the agent from personal responsibility

on the bond.

Judgment for defendant.

(s) J. Skelly Wright
United States District Judge

New Orleans, Louisiana
September 10, 1956.

...oOo...

J U D G M E N T

September 11th, 1956 Wright, J:

(Number and title omitted)

This cause came on at a former day to be heard on the motion of the defendant to dismiss and for summary judgment and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, on due consideration thereof, and for the written reasons of the Court on file herein;

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that judgment be and is hereby entered in favor of the defendant and against the plaintiff, dismissing plaintiff's suit, with costs. Entered: Sep 13,1956.

(s) J.S.W.

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NOTICE OF APPEAL

(Number and title omitted) (Filed: September 25, 1956)

Notice is hereby given that MANUFACTURERS CASUALTY INSURANCE COMPANY, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this matter on September 13,1956.

(s) Parnell J. Hyland
Attorneys for Plaintiff-Appellant

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DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

(Number and title omitted) (Filed: October 2, 1956)

Appellant designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Complaint.

2. Answer.

3. Motion to dismiss and for summary judgment, together with affidavit of George E. Martin and all exhibits attached thereto and filed in connection therewith.

4. Memorandum of authorities filed by defendant in support of motion to dismiss.

5. Memorandum on behalf of complaint in answer to defendants motion to dismiss, together with all exhibits filed in connection therwith.

6. Supplemental memorandum of defendant replying to complainant's answer to the motion for summary judgment.

7. Supplemental memorandum of complainant in answer to defendant's motion to dismiss.

8. Second supplemental memorandum of defendant replying to first supplemental memorandum of complainant's answer to the motion to dismiss and for summary judgment.

9. Judgment of the District Court.

10. Reasons for judgment of the District Judge.

11. Notice of appeal.
12. This designation.

(s) Parnell J. Hyland
Porteous & Johnson
Attorneys for Plaintiff-appellant

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DESIGNATION BY APPELLEE OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

(Number and title omitted) (Filed: October 10, 1956)

In accordance with the notice received by Appellee on October 1, 1956, Appellee designates the following to be contained in the record on appeal in the above entitled action:

1. Affidavit of George E. Martin.

2. Exhibit D-1, letter from Manufacturers Casualty Insurance Company dated 1/12/51, to Martin LeBreton Insurance Agency.

3. Exhibit D-2, telegram from Naufacturers Casualty Insurance Company to Martin-LeBreton Insurance Agency, and letter dated January 24, 1951. (Two documents to this exhibit).

4. Exhibit D-3, letter from Manufacturers Casualty Insurance Company to Martin-LeBreton Insurance Agency, dated 1/23/51.

5. Exhibit D-4, letter dated 2/3/51 to Manufacturers Casualty Insurance Company from Martin-LeBreton Insurance Agency.

6. Exhibit D-5, telegram dated January 30, 1951, from Manufacturers Casualty Insurance Company to Martin-LeBreton Insurance Agency.

7. Exhibit D-6, letter from Manufacturers Casualty Insurance Company dated 4/19/51, to Martin-LeBreton Insurance Agency.

8. Exhibit D-7, letter from Manufacturers Casualty Insurance Company dated 7/31/51, to Martin-LeBreton Insurance Agency.

9. Exhibit D-8, letter from Manufacturers Casualty Insurance Company dated 8/1/51, to Martin-LeBreton Insurance Agency.

10. Exhibit D-9, consisting of Check No. 4159 of Martin-LeBreton Insurance Agency dated 3/8/51, payable to Manufacturers Casualty Insurance Company, and four Monthly Reports to Manufacturers Casualty Insurance Company.

11. Letter dated 3/16/51, to Manufacturers Casualty Insurance Company from Martin-LeBreton Insurance Agency, identified as 'Defendant.1'.

NORMANN & NORMANN
Attorneys for appellee

By: (s) F. Normann
Frank S. Normann

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CLERK'S CERTIFICATE:

I, A. DALLAM O'BRIEN, JR., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 79 pages to contain a true and correct copy of the record in the case entitled "Manufacturers Casualty Insurance Company -vs- Martin-Lebreton Insurance Agency" No. 5174 Civil Action of the docket of this court as made up on accordance with the Designations of Contents copied herein.

WITNESS my hand and the seal of said Court at the City of New Orleans, Louisiana, this 30th day of October, A.D. 1956.

(s e a l
o f
c o u r t)

A. DALLAM O'BRIEN, JR., CLERK

BY _____
Deputy Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 444

MARTIN-LEBRETON INSURANCE AGENCY,
Petitioner,

versus

MANUFACTURERS CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK S. NORMANN
Normann & Normann
Counsel for ~~Appellee~~ Petitioner

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District Court for the Eastern District of Louisiana, New Orleans Division, entered on September 10, 1956. A rehearing was denied on June 14, 1957.

OPINIONS BELOW

The opinion of the District Court filed on September 11, 1956, is reported in 144 F. Supp. 515; the opinion of the Court below filed on March 28, 1957, is reported in 242 F. 2d 951.

Nine copies of the record as printed for the Court below, the judgment and opinion of the United States Court of Appeals, Fifth Judicial Circuit, and the order denying a rehearing are for convenience appended to this petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the decree sought to be reviewed and the date of its entry are March 28, 1957. The date of the order denying a rehearing is June 14, 1957. The statutory provision believed to confer on this court jurisdiction is the United States Code, Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1) May the U. S. Court of Appeals sitting in the State of Louisiana in a diversity of citizenship case disregard the applicable codal provision and case law in that state and base its decision on federal cases from other jurisdictions?

2) Where the state law provides for immediate repudiation of an agent's unauthorized act, does not inaction on part of the principal for a period of over 40 days together with retention of benefits derived from such unauthorized act amount to ratification as a matter of law?

LOUISIANA CIVIL CODE PROVISION

Article 3010 of the Louisiana Civil Code of 1870 expressly provides for ratification of unauthorized acts on part of the agent:

> "The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the principal, *unless ratified by the latter*, and the attorney is alone bound by it in his individual capacity."

STATEMENT OF CASE

Petitioner was general representative and agent in New Orleans for respondent under an agreement entered into on June 18, 1948. (Tr. 6-13)

Contractor Geiger applied for performance bonds covering two of his contracts with the Orleans Parish School Board, one in the amount of $2,780 and the one in suit in the amount of $13,800. Petitioner requested authority from respondent to execute the bonds in its name covering the two contracts. By wire of January 23, 1951, authority was granted as to the $2,780 contract. On the same day respondent also wrote a letter to petitioner confirming the wire and stating in addition:

"In regard to the bond of approximately $13,-800 for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond." (Tr. 29)

On January 24, 1951, after receipt of the wire but prior to receipt of respondent's letter, petitioner wrote respondent advising it —

"We expect both the $2,780 bond and the $13,-800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so." (Tr. 28).

On January 25, 1951, both bonds were executed by petitioner in the name of respondent, and were, on January 29, 1951, recorded with the contracts in the office of the Recorder of Mortgages for the Parish of Orleans. On January 30, 1951, respondent wired requesting petitioner:

"Do not execute Bond J. H. Geiger Thirteen Thousand Eight Hundred unless authorized, see letter January Twenty-Third." (Tr. 31)

On February 3, 1951, petitioner advised respondent that both bonds had been executed expressing its contention that —

"I feel sure that if you and your underwriting committee look at this case from an objective point

of view, you will concur with the actions already taken." (Tr. 29-31)

Respondent did not answer this letter of February 3, 1951. On March 8, 1951, petitioner forwarded to respondent its report covering insurance and bonds written during January, 1951, and enclosed its check covering respondent's portion of the premium on the bond in suit. (Tr. 34) On March 16, 1951, petitioner advised respondent that there was no doubt that, by reason of the default of the contractor, a loss would be sustained. (Tr. 70) Respondent did not respond until March 21, 1951, when it advised petitioner that it would hold it personally responsible for any loss on the bond. (Tr. 48) At no time did respondent notify the Orleans Parish School Board or the contractor that the bond was unauthorized nor did it make any attempt to cancel the bond. On the contrary, after enlisting the aid of petitioner while insisting on its right to claim reimbursement for any loss, respondent completed the contract; petitioner, under a disclaimer of personal liability on the bond, cooperated fully with respondent in completing the contract as evidenced by respondent's letter of August 1, 1951. (Tr. 33)

Respondent brought suit against petitioner in the United States District Court, Eastern District of Louisiana, New Orleans Division, invoking jurisdiction of this Court based upon diversity of citizenship and amount in controversy exceeding $3,000.00. The District Court granted summary judgment to petitioner on the grounds that respondent by its inaction and silence had ratified the originally unauthorized bond and could, therefore, not make any claim over against the agent for its loss on the bond. (Tr. 70-76)

On appeal to the United States Court of Appeals for the Fifth Circuit this judgment was reversed and the case was remanded with instructions, for trial on its facts. (Tr. 82-99) A subsequent petition for rehearing was denied. (Tr. 123)

REASON FOR ALLOWANCE OF WRIT

Under the United States Code, Title 28, Sec. 1254(1), this Court may grant a writ of certiorari before or after rendition of judgment in the United States Courts of Appeals. Based on the decision of this Court in *United States v. General Motors Corp.*, 323 U. S. 373, 377, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945), certiorari may be granted even in a case that has been remanded by the Court of Appeals to the District Court with instructions for trial, the reason being that a review of the ruling made by the Court of Appeals is fundamental to the further conduct of the case. True, the *General Motors* case involved the interpretation of a constitutional provision and is, therefore, distinguishable from the instant case; but petitioner respectfully urges that a writ of certiorari should also be granted in a case where the Court of Appeals has reached a judgment totally inconsistent with the applicable law in the jurisdiction as established by the Louisiana Civil Code of 1870 and an unbroken line of decisions by the highest Courts of this state.

Petitioner urges that inasmuch as the ruling made by the Court of Appeals will materially affect the further conduct of this case, this Court may grant a writ of certiorari at this time rather than await the decision of the Trial Court which will necessarily have to be based on the incorrect directions given by the Court of Appeals.

Ever since *Erie v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, (1938) any question as to the source of law to be applied by the Federal Courts in diversity of citizenship cases is moot, and the Federal Courts may not substitute their own interpretation of the state law for that of the State Courts.

Petitioner is prepared to show that the law of Louisiana is settled beyond dispute to the effect that a principal ratifies the unauthorized acts of his agent by failure to repudiate within a reasonable time and by retaining the benefits derived from such unauthorized acts.

This principle was established in the Louisiana jurisprudence as early as 1848 and has never since been questioned. In the case of *Ward v. Warfield*, 3 La. Ann., 468, 471 (1848), the Louisiana Supreme Court held:

> "The principle is well settled that the obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceed his commission, or risk his principal's effects without authority, he renders himself responsible to the principal for the consequences of his act . . . But while this general doctrine may be considered as unquestionable, there are other principles which are equally settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority; and hence where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, **even for a moment,** he will be bound by them, and

> the agent will be discharged. Nor is it necessary that such assent should be expressed. It may be inferred from the conduct of the parties."

Furthermore, "the principal's acts will be liberally construed in favor of a ratification," as evidenced by the opinion in *Flower v. Jones*, 7 Martin (N.S.) 140 (1828). It should be noted in this connection that the principle of ratification as applied in Louisiana is based on French-Roman law rather than the English common law, and that the Louisiana Courts have frequently relied on French commentators in deciding this point. See *Flower v. Jones*, 7 Martin (N.S.) 140, 143 (1828). In fact, the Louisiana Civil Code of 1870, Article 3010, former Article 2979 of Civil Code of 1825, has incorporated the principle of ratification, and decisions under this article definitely favor ratification in such situations. *Pitts v. Shubert*, 11 La. 286, 30 Am. Dec. 718 (1837); *Flower v. Downs*, 6 La. Ann. (1851); *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382 (1868); *Oliver v. Johnson*, 24 La. Ann. 460 (1872); *Succession of Gilmore*, 154 La. 105, 97 So. 330 (1923). The latest case on the point of ratification decided by the Louisiana Supreme Court is the case of *Jeffrey Motor Company v. Higgins*, 230 La. 857, 89 So. 2d 369 (1956). In this case the agent was authorized to sell a car for cash, but not on credit. Nevertheless, in violation of these instructions, the agent sold the car accepting the draft, which was turned over to the principal and leposited by the latter. The Court held that the principal's action —

> " . . . in not repudiating the payment by draft at a future date, and in depositing the draft . . . for collection, constituted his ratification."

Upon the weight of this authority, petitioner contends that the Court of Appeals erred in not applying the Louisiana law to this case. The opinion of the Court relies on federal cases from other jurisdictions with the exception of one case, *Canada Steamship Lines v. Inland Waterways Corp.*, 166 F. 2d 57, 59 (1948), which did not even involve the issue of ratification argued by petitioner in this case. In the *Canada Steamship Lines* case, the same Court of Appeals found that:

> "(6) . . . (b) It is established by undisputed proof that until advised of the payment of the duty, plaintiff did not know that any duty had been, or would be, incurred and paid, and it then **immediately and thereafter protested** the payment."

The Court of Appeals apparently believed that it was bound by its decision in that case, without realizing that the facts are entirely different inasmuch as the principal in the *Canada Steamship Lines* case, immediately upon notice of the agent's unauthorized act repudiated the same An analysis of the opinion of the Court of Appeals clearly shows that the Court failed to apply Louisiana case law with the exception of one case which is not controlling at all. But the Court of Appeals went even further than that and instructed the District Court to proceed under the incorrect assumption that the principal's failure to seasonably repudiate the agent's unauthorized acts does not amount to a ratification. This instruction is contrary to Louisiana law and can only result in a mistrial upon remand to the District Court. The District Court may not ignore these instructions and must, therefore, feel itself bound to

apply these erroneous principles laid down by the Court of Appeals.

The facts in the instant case are undisputed, all the evidence is before the court and **both parties agree that the instant case is governed by Louisiana law.** (Tr. 101-117) For that reason, the only question left is whether inaction on part of the principal for a period of 46 days together with retention of the premiums does amount to ratification under the applicable Louisiana law.

This problem was clearly recognized by Mr. Justice Rives, who wrote the dissenting opinion in the instant case stating that:

> "In the present case, the principal waited from shortly after February 3 until March 21st, or for more than forty days, with no answer to the agent's letter of February 3rd, which, especially in view of the previous correspondence, plainly called for a reply if the principal did not intend to ratify the agent's act. In the meantime, the principal had received, deposited and still retains the premium for the bond. That seems to me inconsistent with its contention that the risk of loss was primarily that of its agent. Not until the agent had notified the principal of the certainty of a loss under the bond, did the principal break its silence, refer to the agent's original and admitted lack of authority, and seek to hold the agent personally responsible. That will not do." (Tr. 17)

In the case of *Ward v. Warfield*, 3 La. Ann. 468, 472 (1848) the agent was authorized to sell cotton in New Orleans, but not in a foreign market. In violation of these instructions, he actually did ship cotton to a foreign market and notified his principal thereof. The principal remained silent for a period of 4½ weeks after which he disavowed the agent's act and brought action against him for the loss incurred. The Louisiana Supreme Court held that failure to repudiate for a period of 4½ weeks amounted to ratification, barring the principal from recourse against his agent, since:

> "Under the well settled rule it was his duty to answer in a reasonable time . . . But we cannot but think with the judge below, that, the length of this delay on the part of Warfield, was very suspicious. It looks very much like waiting the fluctuation of the market, to get the certainty whether the shipment to Europe would be beneficial or prejudicial. In morals this does not seem fair towards a party who had acted in good faith for what he supposed the interest of his employer; and, for that reason, the law does not permit it:"

The analogy to the instant case is obvious. In *Ward v. Warfield* the principal repudiated after realizing that the agent's act was detrimental; in the instant case the principal repudiated after **6½ weeks,** and then only upon notice that its agent's act would cause a loss.

In 1848, a period of 4½ weeks was held to be unreasonable. In 1956, in view of improved communication systems, a period of 6½ weeks should certainly be held un-

reasonable as a matter of law. The *Ward v. Warfield* case is still the law in Louisiana and is, therefore, decisive in the instant case.

The instructions given to the District Court are contrary to every Louisiana case on this point and contrary to the principles laid down in *Erie v. Tompkins* for the application of local law. Furthermore, these erroneous instructions will control the trial of the case in the District Court, thereby depriving petitioner of the right to a trial in accordance with state law.

Thus, the decision below interpreting an important codal provision of the Louisiana Civil Code and pertinent cases thereunder leaves the law in uncertainty, and the determination of this question by this Court will settle the point of law and remove the uncertainty and make for uniformity of decisions as to the rights of litigants in cases involving the principle of ratification in agency-principal relationships.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Frank S. Normann
Attorney for Petitioner

APPENDIX

JUDGMENT

Extract from the Minutes of March 28, 1957.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

No. 16367, versus

MARTIN - LEBRETON INSURANCE AGENCY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for trial and for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Martin-LeBreton Insurance Agency, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

OPINION OF THE COURT

Filed: March 28, 1957

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16367

MANUFACTURERS CASUALTY INSURANCE COMPANY,

Appellant,

versus

MARTIN-LEBRETON INSURANCE AGENCY,

Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana

(March 28, 1957)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Appealing from a summary judgment dismissing, for the reasons stated in the opinion,[1]

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[1]Manufacturers Cas. Ins. Co. v. Martin Lebreton Insurance Agency, 144 F. Supp. 515.

its action to recover damages for loss caused by unauthorized act of the agent in executing a building performance bond, plaintiff is here insisting that the judgment should be reversed because the case was not one for summary judgment but for trial, and because, if the case was one for summary judgment, the judgment should have been for plaintiff.

The facts,[2] insofar as shown, are simple. The law is equally so.

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[2]On June 18, 1948, defendant became the agent for complainant under an agency agreement which provided among other things: "The agent shall in no case obligate the company except within the limitations in the instructions issued by the company. * * * Agent agrees to keep and observe with all fidelity to company all instructions by it to agent."

The agent had no authority to write contract performance bonds or bonds of any sort.

On Jan. 12, 1951, agent, desiring to write bonds for one Geiger, who it advised "has been recommended to us — Dunn and Bradstreet have no information on him", requested, by night letter, wire authorization to execute a bond on a small painting job for $2780 and temporary authorization to write other bonds for him, pending "your complete investigation".

On the same day the plaintiff sent a telegram to the defendant reading as follows: "Prefer not to authorize painting bond James H. Geiger without full investigation. Writing".

On the same date plaintiff wrote to the defendant expressing lack of confidence in Geiger as a credit risk on the basis of inability to find anything about him, and stating, "We do not feel that we should authorize this bond until such time as the completed financial statement is forwarded to us by Mr. Geiger". It also requested other and full information about him.

Under date of Jan. 23, 1951, plaintiff sent a wire authorizing the $2780 bond and on the same day this authority was confirmed in a letter to the agent in which insurer wrote, "In regard to the bond of approximately $13,800 for Mr. Geiger (which plaintiff had requested authority to write), we wish to advise that as soon as you know the other bids, we wish that you would let us know immediately and we will see what we can do toward authorizing this bond."

In the face of this correspondence and plaintiff's specific refusal to authorize the execution of the bond, the defendant, on Jan. 25, 1951, without any authority to do so, signed the bond, and on Jan. 29, placed the contract and the bond on record in the mortgage office.

Defendant, however, was not advised of the execution until Feb. 3, 1951. The remittance by the agent for premiums written in the month of January was not made until well into March, the execution report is not dated, the check is dated March 8, and it was deposited on March 13, 1951.

On March 16, the defendant wrote to the claim department of plaintiff, advising that there was evidence of a possible loss under the bond.

On March 21, Mr. Cordell, Vice-President of plaintiff, wrote it expressing surprise that it had executed the bond in violation of its express authority and advising that it would hold the agent liable for any loss sustained.

The insurance company thereafter completed the contract, the agent under a disclaimer of personal liability on the bond cooperating fully with the insurer in completing it.

The district judge, stating: "The defendant agency admits that the bond was executed without authority. It argues that, in the state of the relationship between the parties, at the very least the insurer owed it a duty to disavow its action immediately if the insurer intended to do so, in order that the agency could seek another bond to substitute for the one in suit."; held that the defendant was right because, where an agent exceeds its authority, the principal must, to hold him accountable, immediately upon notice repudiate the agent's action. Otherwise, the principal is deemed to have ratified his agent's act, and "where, as here, repudiation by the principal may be unavailing as to third parties and the agent is sought to be held personally accountable, there still arises the duty immediately to notify the agent of disavowal so that he may protect himself if he can."

Proceeding, then, on the motion for summary judgment, to treat the case as though it presented no issue of fact, the court found that the agent had acted in good faith, that the insurer had not acted promptly enough to disavow the agent's authority to act, and that, through its inaction, it had prejudiced the position of its agent and was, therefore, estopped to make any claim over against the agent for the loss on its bond.

We cannot agree with these views. The law is well settled: that an agent owes to his principal the obligation of high fidelity; that he may not proceed without, or beyond, his authority, particularly where he has been forbidden to act; and that, if so proceeding, his actions cause loss to the principal, the agent is fully accountable to the principal therefor.

> "* * * An elementary factor in the principal-agent relationship is control. As stated in I Restatement, Agency, Sec. 14, p. 47: 'A principal has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Ledbetter v. Farmers Bank & Trust Co.*, 142 F (2) 147, at page 150.

This court has had occasion many times to deal with suits against agents for failure to obey instructions. In *Blackshear Mfg. Co. v. Umatilla Fruit Co.*, 48 F(2) 174, a suit for negligence and bad faith of a salesman in extending credit, this court, holding that the evidence was sufficient to take the question to the jury, declared:

> "The law exacts of every agent and employee diligence, good faith, and obedience to instructions in the execution of his agency or employment, and holds him liable for failures therein that occasion damage."

In *Eagle Indemnity Co. v. Cherry*, 182 F(2) 298, the court declared:

> "It is fundamental law that an agent bears a fiduciary relationship to his principal, and owes him the duty of good faith and loyalty. 2 Am. Jur., 202, Sec. 251, 261, 268. By virtue of this relationship, no agent is entitled to take any unfair advantage that his position may offer him to profit at his employer's expense, beyond the agreed compensation for his service."

In *Palmer v. Chamberlin*, 191 F(2) 532, this court again declared:

> "Likewise, 'an agent is a fiduciary with respect to the matters within the scope of his agency' 2 Am. Jur. Agency, Sec. 252."

Finally, in *Canada Steamship Lines v. Inland Waterways Corp.*, 166 F(2) 57, a suit brought in Louisiana by a principal against his agent for damages for failure to follow his instructions, this court, holding the agent liable, discussed fully the principles controlling in suits between principal and agent of the kind presented here. There, stating:

> "The general principles of the law of agency as they apply here, are not in confusion. They may be found set down in Am Jur., 'Agency', Secs. 251-278. They leave in no doubt that where, as here, an agent has been given general instructions to clear a shipment, which instructions could be carried out in the interest of the principal without incurring duty, if the agent, without returning for more instructions, assumes to take a course in carrying the instructions out which subjects the shipment to duty, the agent, and *not the principal*, must bear the loss."

we gave full application to these principles.

Under the undisputed facts in this case and the settled law applicable thereto, unless and until the principal, with full knowledge of all the applicable facts, waives the breach of his instructions and adopted the agent's act, in writing

the bond, as its own, the agent becomes and remains liable to the principal for the damages resulting from its assuming to act to the disadvantage of its principal without authority and in breach of instructions. In short, in the absence of clear proof of facts showing an express and knowing adoption of the agent's act as its own, or otherwise raising an estoppel against the defendant to assert the admitted breaches of the agent's obligations as a fiduciary, the matter stands, as it stood in the Canada Steamship Line case, *supra*, where this court said of an agent:

> "Defendant, acting precipitately and unreasonably, and without authority, incurred the duty (here the loss). It, and not plaintiff, should pay it."

The case was not tried and determined on its facts. Instead, it was determined as matter of law and without a trial on the incorrect assumption that, notwithstanding the agent's admitted and grievous breach of its duty, it could escape the loss and throw it on its principal, *upon the mere claim that the principal did not immediately repudiate the bond*. The law is not so written.

The judgment is REVERSED and the cause is REMANDED for trial and for further proceedings not inconsistent herewith.

RIVES, Circuit Judge, Dissenting:

The sole and simple issue in the district court was whether the principal, Manufacturers Casualty Insurance Company, as between itself and its local agent in New Orleans, ratified the act of the agent in writing a contract performance bond. There was no claim that the agent had original authority to write such a bond.

On January 12, 1951 the agent sent a night letter telegram to the principal advising that one Geiger was the successful bidder on "a small painting job for $2780," giving a brief summary of Geiger's experience, assets and liabilities and requesting authority to execute the bond. On the same day the agent wrote the principal an air mail special delivery letter giving additional information about Geiger, and concluding:

> "Mr. Geiger, I am quite sure will be formally awarded the contract referred to in my letter of $2,780.00 on Monday and he has a bid out of $13,800.00 on which there is a possibility he may also be awarded that contract. This makes a total of $16,580.00.
>
> "We would like to get this man started and in the light of this additional information which I have developed for you I would appreciate your letting us have authorization by wire."

Still on the same date, January 12th, the principal wired the agent: "Prefer not to authorize painting bond James H. Geiger without full investigation. Writing."

The principal's letter of the same date to the agent read:

"Re: James H. Geiger, d/b/a Bennette's
Contracting Co.
Painting Job approximately $2780.

* * *

"Immediately upon receipt of your night letter we wired you stating that we preferred not to authorize this job without full investigation. We know nothing whatsoever of Mr. Geiger and upon looking over the Dun & Bradstreet book for January of this year, we cannot find that he is even listed personally; neither is the Bennette Contracting Company. While we have no doubt the statement which you have made in this night letter is correct, we still do not feel that we should authorize this bond until such time as a completed financial statement is forwarded to us by Mr. Geiger. We also would like the names of the supply houses from whom he makes his purchases and verification of the cash in bank. As soon as these papers are submitted we will be very glad to commence our investigation and, if satisfactory, will see what we can do towards giving you authority to execute bonds for this concern.

"In your night letter you state he has Accounts Receivable of $1400. As no information is given as to these Accounts Receivable, we are wondering if perchance they might be some receivables

from some small painting jobs which he has already done.

"Please forward the necessary papers immediately and we will do the best we can for you for this concern."

So far as the present record shows, the next communication was on January 23rd, when the principal wired the agent: "Authorize contract bond two thousand seven hundred eighty dollars James H. Geiger—"

Also on January 23rd, the principal wrote a letter to the agent as follows:

"This will confirm our wire authorizing you to execute a bond for James H. Geiger covering a contract of approximately $2780. In regard to the bond of approximately $13,800. for Mr. Geiger we wish to advise that as soon as you know the other bids we wish that you would let us know immediately and we will see what we can do toward authorizing this bond."

On the next day, January 24th, the agent wrote to the principal:

"Gentlemen:

RE: J. H. Geiger

"Thank you for your authorization in connection with the above case authorizing the execution of

the bond for $2,780.00. We are sorry that we had to rush you so much in this case, particularly since nothing has happened as of this day. However, we expect both the $2,780.00 and the $13,800.00 to break momentarily. We assume that it is in order to execute bonds covering both contracts should we be called upon to do so.

"Our principal as previously explained will not undertake any other job until these are completed."

On the next day, January 25th, both bonds were executed by the agent in the name of the principal, and on January 29th, the contracts and the contract performance bonds were placed on record in the Mortgage Office for the Parish of Orleans. Thereafter, on January 30th, the principal wired the agent: "Do not execute bond J. H. Geiger thirteen thousand eight hundred unless authorized see letter January twenty third—"

On February 3rd, the agent wrote the principal:

"RE: James H. Geiger—your letter of January 23, 1951.

* * * * *

"As to James H. Geiger, we executed the bond authorized in the sum of $2780.00 and he was also awarded the contract which we discussed over the telephone for $13,800.00. He was low bidder by $1560.00. The $13,800.00 case and the $2780.00 broke simultaneously. Mr. Geiger called very early on

the morning of January 25, 1951 and asked me to meet him in the notary's office at 9:30 a.m., which I did, and we executed both bonds since his bid was in line.

"As previously explained, Mr. Geiger was well recommended by the people we contacted as to honesty, integrity, and ability, with the further fact that he has handled like jobs of this size and larger before.

"The delay in corresponding with you was due to the fact that I was waiting for a copy of the contract from the Orleans Parish School Board's notary in order that we may furnish you with all pertinent papers at one time.

"I feel sure that if you and your underwriting committee look at this case from an objective point of view, you will concur with the actions already taken."

So far as the record shows, there were no further communications between the principal and agent for more than a month. On March 8th, the agent forwarded to the principal its regular reports covering insurance and bonds written by it during the month of January, enclosing with said reports the principal's portion of the premiums in the amount of $208.49. The premium for the $13,800.00 was listed in the reports as "Policy No. 42699, Assured—Bennettes Contr. Co., 30% Bonds 138.00, Contr. gem, Total Premium 138.00." The check was deposited by the principal on March 13, 1951, and is still retained by it.

On March 16th, the agent wrote to the claim department of the principal:

RE: Bond No. 42699—Manufacturers—
Bennette's Contracting Company

"I know that you will sustain a loss under the above captioned. We have not been notified officially or unofficially. However, there is mounting evidence at this time to justify my opinion.

"Kindly let us or your attorney have your instructions as the specifications provide that the Surety has only ten (10) days to act once they are officially notified.

"Through our contracting connection, I believe we can minimize the loss and you may rely upon us for our utmost cooperation."

The agent's previous communications had been directed to the Superintendent of the Contract Department of the principal at the same address, 1617 Pennsylvania Boulevard, Philadelphia, Pennsylvania.

On March 21st, the vice-president of the principal wrote the agent:

"RE: Bond 42699—James H. Geiger dba
Bennett's Contracting Co.

"We are indeed surprised to receive execution report from your office advising that you had exe-

cuted the above captioned bond in the amount of $13,800. for James H. Geiger, doing business as Bennette's Contracting Company, for water-proofing exterior of Warren Easton High School, New Orleans, La., without having authority from this office for the execution of the bond.

"Your files will clearly indicate we did not authorize execution of this bond and in fact we wrote you on January 23rd advising that we were not authorizing the bond. We also wired you on January 30th not to execute this bond.

"At the time power of attorney was given you we issued to you underwriting instructions, by the terms of which you agreed to submit all contract bonds to this office for approval before execution. We have copy of Limitations of Authority signed by both G. E. Martin and Edward F. LeBreton, Jr.

"Since you have violated your underwriting instructions and agreement in connection with the issuance of this bond, we will expect to hold you responsible for any loss which we may sustain by reason of the execution of this bond in violation of your authority."

Upon the default of the contractor, Geiger, the principal took over the work, enlisted the aid of its agent in securing bids from other contractors, and the agent, under a disclaimer of personal liability, co-operated with the principal in completing the contract.

Under the foregoing undisputed facts, the learned district judge, in a clear and full opinion reported as *Manufacturers Casualty Insurance Co. v. Martin-LeBreton Insurance Co.*, 144 F. Supp. 515, held that as between the principal and the agent, the principal had ratified the act of the agent.

I think that the district judge was correct. As said in I Restatement, Agency §94, p. 234:

> *"An affirmance of an unauthorized transaction may be inferred from a failure to repudiate it.*
>
> *"Comment:*
>
> "a. Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent may be inferred. * * * * * Whether or not such an inference is to be drawn is a question for the jury, unless the case is so clear that reasonable men could come to but one conclusion."

See also, 2 Am. Jur., Agency, §§232, 233.

That this principle applies as between principal and agent is made plain by the opinion of the district court, see 144 F. Supp. at p. 517. If further Louisiana authority to that effect is needed, I would cite: *Dupre v. Splane*, 16 La. 51; *Starr v. Zacharie*, 18 La. 517; *Reed v. Ritchey*, 2 La. Ann. 796; *Stanfield v. Tucker*, 4 La. Ann. 413; *Beau v. Drew*, 15 La. Ann. 461; *Featherston v. Graham*, 17 La. Ann. 42; *Raymond v. Palmer*, 6 So. 692, 41 La. Ann. 425, 17 Am. St. Rep.

398. In the last cited case, the Supreme Court of Louisiana said:

> "The principle which gives legal effect to acts of an agent unauthorized by, or in violation of, his mandate, in consequence of the silence or acquiescence of the principal, is quite familiar in our jurisprudence. In the case of Ward v. Warfield, 3 La. Ann. 468, the agent, to whom cotton had been consigned for sale in New Orleans, shipped it to Liverpool, where it was sold, for account of his principal, at a price less than the market value of the cotton in New Orleans at the date of the shipment to Liverpool. The principal had been notified of the transaction, and had been offered the option of accepting the risk of the venture, or of closing the sale with the agent at the stipulated market value of the cotton in New Orleans at the time. In the meantime the cotton market in Liverpool had depressed, and the cotton was sold there at a reduced price, resulting in a considerable loss from the amount of credits allowed to his principal by the agent; and suit was brought by the latter for the recovery of the difference between the credit thus given and the actual proceeds of the sale of the cotton. The offer of the agent to take the cotton at its market value in New Orleans remained unanswered for one month, at the end of which time the principal answered that he accepted the offer of purchase by the agent. But the court held the silence of the principal for one month to be equivalent to an acquiescence in the acts of the agent; and the latter recovered his demand.

The court said: 'The principle is well settled that the obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions. If he unnecessarily exceeds his commission, or risk his principal's effects without authority, he renders himself responsible to the principal for the consequences of his act. If loss ensue, it furnishes no defense to him that he intended the benefit of his principal. But, while this general doctrine may be considered as unquestionable, there are other principles which are equally well settled in the law of agency. Subsequent assent, as between principal and agent, is equivalent to a previous authority; and hence, where an agent has committed a breach of orders, and the principal, with full knowledge of all the consequences, adopts his acts, even for a moment, he will be bound by them, and the agent will be discharged. Nor is it necessary that such assent should be express. It may be inferred from the conduct of the principal.'

"In the case of Lafitte v. Godchaux, 35 La. Ann. 1161, this court applied the doctrine under circumstances quite similar to the facts disclosed in the present case. The pledgee of certain shares of insurance stock had reported to the pledgeor a sale thereof, under the authority of the act of pledge, and claimed a balance due him on account of his note secured by the pledge, which the pledgeors made good. Subsequently, the latter brought suit for the recovery of the stock on the ground that the pledgee had not truly sold the stock, but had detained the same for his own account. While the

court conceded that the sale made by the pledgee was a nullity, it rejected plaintiff's demand, on the ground of his acquiescence, resulting from long silence after full knowledge of the facts. It was said in that case: 'In such a transaction the relation of the pledgee to the pledgeor is precisely that of an agent to his principal, and the validity of his acts must be tested under the same rules. Those rules are well known and firmly established in our jurisprudence; and they hold the acquiescence or long silence of the principal touching an unauthorized or illegal act of his agent as a ratification of the act or contract of the agent.' See, also Allison v. Watson, 36 La. Ann. 616; Bennett v. Bank, 34 La. Ann. 150; Starr v. Zacharie, 18 La. 517; Dupre v. Splane, 16 La. 51." *Raymond v. Palmer*, 6 So. 692, 695, 696.

In the case principally relied on by the principal, *American Fire & Marine Insurance Co. v. Seymour*, 144 So. 775, it was held that casualty insurance policies issued by the local agent without actual authority were not ratified because the insurer failed to cancel them within *three days* after notice of issuance reached the general agent's office.

In the present case, the principal waited from shortly after February 3 until March 21st, or for *more than forty days*, with no answer to the agent's letter of February 3rd, which, especially in view of the previous correspondence, plainly called for a reply if the principal did not intend to ratify the agent's act. In the meantime, the principal had received, deposited and still retains the premium for the bond. That seems to me inconsistent with its contention

that the risk of loss was primarily that of its agent. Not until the agent had notified the principal of the certainty of a loss under the bond, did the principal break its silence, refer to the agent's original and admitted lack of authority, and seek to hold the agent personally responsible. That will not do.

Principals are under just as much obligation to deal honestly with their agents as agents are with their principals. It seems to me that simple honesty of dealings between the parties requires an affirmance of this judgment. I, therefore, respectfully dissent.

ORDER DENYING REHEARING

Extract from the Minutes of June 14, 1957.

MANUFACTURERS CASUALTY INSURANCE COMPANY,

No. 16367, versus

MARTIN-LEBRETON INSURANCE AGENCY.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.